United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2026

To be argued by
GERALD A. FEFFER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-2026, 74-2027 and 74-2065

UNITED STATES OF AMERICA,
Appellee,

—v.—

MILTON COHEN, BERNARD DEUTSCH and
STANLEY DUBOFF,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Milton Cohen, Bernard Deutsch and Stanley Duboff appeal from judgments of conviction entered on July 12 and July 16, 1974 in the United States District Court for the Southern District of New York, after a seven-week trial before the Honorable Robert J. Ward, United States District Judge, and a jury.

Information 74 Cr. 447, filed April 23, 1974, charged the three appellants in four counts with various violations of the federal securities laws.* Count One charged all

* Information 74 Cr. 447 superseded Indictment 73 Cr. 1085 filed on November 29, 1973. Information 74 Cr. 447 simply consolidated the fifteen substantive counts in Indictment 73 Cr. 1085 into three substantive counts for the purpose of reducing the complexity of the case for the jury. In addition, Daniel Driesman, a defendant in the Indictment, was named as an unindicted co-conspirator in the Information.

three defendants and fourteen additional co-conspirators with conspiracy to violate the federal securities laws and to commit mail fraud in connection with the manipulation of the common stock of Richard Packing Company, in violation of Title 18, United States Code, Section 371. Counts Two and Three charged each of the defendants with fraud in the offer and sale of securities, and with aiding and abetting such fraud, in violation of Title 15, United States Code, Sections 77q and 77x and Title 18, United States Code, Section 2. Count Four charged all three defendants with the mailing of false and misleading offering circulars, and with aiding and abetting such fraud, in violation of Title 15, United States Code, Sections 77j and 77x; Title 17, Code of Federal Regulations, Section 230.256; and Title 18, United States Code, Section 2.

Trial commenced before Judge Ward on April 23, 1974. On June 7, 1974, the jury found Cohen, Deutsch and Duboff guilty on all counts.

On July 12, 1974, Deutsch was sentenced by Judge Ward to concurrent terms of three years imprisonment on each of the four counts. On July 16, 1974, Judge Ward sentenced Cohen to concurrent terms of six months imprisonment on each of the four counts and Duboff to concurrent terms of three years imprisonment on each of the four counts.* The defendants are presently at liberty pending their appeal.

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* Deutsch and Duboff are presently under four additional indictments in this District—73 Cr. 1083, 73 Cr. 1084, 73 Cr. 1086 and 74 Cr. 22—each charging them with conspiracy to violate the securities laws and with corresponding substantive crimes in connection with various stock manipulations. 73 Cr. 1083 is pending before Judge Dudley B. Bonsal and is scheduled for trial on December 3, 1974.

Statement of Facts

A. Synopsis

The Government's evidence, presented through the testimony of thirty-two witnesses and several hundred documentary exhibits, established that from July, 1968 through July, 1970 Cohen, Deutsch and Duboff devised and carried out a massive fraudulent scheme to manipulate the price of and to defraud investors in the common stock of Richard Packing Company ("Richard Packing"). Three affiliated mutual funds in Denver, Colorado—Financial Venture Fund, Financial Dynamics Fund and Financial Industrial Fund ("Denver Funds")*—incurred losses of approximately $5.1 million as a result of this fraudulent scheme.

In early 1968, Richard Packing was a small Minnesota hamburger patty producer. Milton Cohen, the President of Richard Packing, with his brother, controlled the company and was in charge of its daily operations.** Deutsch and Duboff, registered representatives with Jaffee & Co., a prestigious New York broker-dealer, became financial consultants for Richard Packing in the late summer of 1968. Shortly thereafter, Richard Packing entered the fast food franchise business.

From September, 1968 through March, 1969, approximately 18,000 shares of Richard Packing stock were traded by Kelly, Andrews & Bradley*** ("KAB"), a recently or-

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* Financial Programs was, and is, the investment adviser to each of the Denver Funds.

** Cohen and his brother owned 369,000 shares of the common stock of Richard Packing of a total of 476,860 shares issued and outstanding.

*** The activities of Kelly, Andrews & Bradley have been before this Court previously. *United States* v. *Marando*, Dkt. No. 73-2378 (2d Cir., July 3, 1974), *cert. denied sub nom. Berardelli* v. *United States*, 43 U.S.L.W. 3280 (November 11, 1974); *United States* v. *Cioffi*, 493 F.2d 1111 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3231 (October 21, 1974).

ganized brokerage firm in New York City. Each of these trades was made pursuant to the specific direction of Deutsch and Duboff. Deutsch and Duboff would set the price of the stock, the number of shares to be bought or sold, and in many instances furnished the party at the other end of the trade. Thirty per cent of the trading profit generated by this directed trading, approximately $15,000, was "kicked back" to Deutsch and Duboff. A portion of these "kick back" payments was sent directly to the Reiss Bank, Zurich, Switzerland at the request of Deutsch and Duboff.

In March, 1969, Richard Packing had a Regulation A public offering of 10,000 shares of its common stock. The offering circular with respect to the Regulation A offering, which had been reviewed "line by line" by Cohen before release, failed to disclose, among other things, that Deutsch, Duboff and others were underwriters in the offering and that the 10,000 shares by prearranged agreement had been placed with relatives of Deutsch and Duboff, and with other accounts over which they exercised control. In addition, the offering circular failed to disclose that Deutsch and Duboff, in return for services to Richard Packing, had received and would receive substantial compensation including Richard Packing common stock and stock options.

From the outset, Richard Packing was plagued with financial and other problems in its fast food franchise operation. In fact, the company was forced to sell off its meat packing facilities to avoid a loss for the fiscal year ending June 30, 1970. In spite of this, Bass & Company, a prestigious public relations firm in New York City, was retained in March 1969, and thereafter, with the knowledge and at the behest of Cohen, issued a series of false and misleading press releases to the investing community over the next year. Similarly, Deutsch made a series of misrepresentations to a portfolio manager and investment analyst for the Denver Funds, as well as to others in the financial community, in which he greatly exaggerated

the number of Richard Packing franchises that had been sold.

From March, 1969, through April, 1970, the Denver Funds purchased 129,844 shares of Richard Packing stock * or approximately 75% of the "float", i.e., the publicly held shares available for trading, at prices ranging from $28½ to $53½ per share. All of these shares were purchased for them by Jaffee & Co., as broker for the Denver Funds, with Deutsch and Duboff receiving brokerage commissions on each sale. During the summer of 1970, after the "bubble" caused by the manipulation had "burst", the Denver Funds sold these shares at $1 per share.

Several brokerage firms, including V.F. Naddeo and New Dimension Securities Corp. ("New Dimension"), in which Deutsch, Duboff and Cohen were undisclosed principals, were used by Deutsch and Duboff to generate market activity and to purchase shares of Richard Packing for resale through Jaffee & Co. to the Denver Funds. For example, from December, 1969, through April, 1970, approximately 45,000 shares of Richard Packing stock were directed through New Dimension by Deutsch and Duboff to the Denver Funds. New Dimension made approximately $100,000 in this trading, a portion of which was siphoned off into the remodeling of a luxurious townhouse on East 38th Street in New York City, owned by Deutsch and Duboff. Moreover, as the price of Richard Packing stock rose, Cohen made close to half a million dollars by selling his own shares for which he had initially paid approximately 17¢ a share.

Appellants' defense consisted primarily of attempts to establish that the trading of Richard Packing stock was

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* As adjusted for two 25% stock splits during the summer of 1969 the Denver Funds held 156,000 shares of Richard Packing stock.

effected in order to procure the best possible prices for the Denver Funds and was transacted in accordance with customary business practice; that the offering circular distributed in connection with the Regulation A offering did not contain any false and misleading statements; that Deutsch and Duboff were not undisclosed principals in New Dimension; and that the representations made by appellants to the Denver Funds and the investing public were true.

B. The Government's Case

1. Richard Packing enters the fast food franchise business

In early 1968, Richard Packing was a Minnesota processor of frozen beef patties. At that time there were 100,000 shares of Richard Packing common stock owned by the public, which were traded in the over-the-counter market as reported by the Minnesota broker-dealer members of the National Association of Securities Dealers, Inc. The high and low bid prices for Richard Packing stock during the first quarter of 1968 were 5 5/8-6 and the high and low ask prices for this same time period were 4 3/8-4 3/4 (GX 5B).*

During the summer and fall of 1968, Richard Packing embarked on plans to enter the fast food franchise business. At that time Deutsch met with Hugh Deane, a stockbroker with institutional accounts employed by Wood, Walker & Company, a brokerage firm in New York City. At this meeting Deutsch, while discussing Richard Packing, told Deane that he was in the process of "trying to build a franchising operation similar to McDonald's" (Tr. 572). Several days later Deane spoke by telephone with Cohen

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* "GX" refers to Government exhibit; "Tr." to the trial transcript; "Br." to the brief of the specified defendant. Defendants' exhibits are referred to by letter preceded by the defendant's name.

who confirmed Richard Packing's plans to enter the fast food franchise business. They arranged to meet and discuss the company's future in more detail in New York City (Tr. 576-77).

In the fall of 1968, Cohen came to New York City and met with Deane and Deutsch at the offices of Status Marketing Corporation ("Status Marketing"), a company engaged in the business of providing custom franchise marketing programs and serving as a franchise sales representative. Richard Packing's franchise program was allegedly "selected by 'Status' from a group of competitive concepts" (Cohen R). In fact, Status Marketing had only recently opened for business, with Richard Packing as its promoter and Cohen serving on its Board of Directors (GX 13A at p. 11). Moreover, Richard Packing was its only client at the time (Tr. 4648).

At this initial meeting, Cohen first outlined the proposed franchising concept. Deutsch then explained that he was going to build a company that was substantially similar to McDonald's yet unique. He further explained how he was going to build Richard Packing's meat business "several fold" through acquisitions in the field (Tr. 582).

Shortly after this meeting Deane telephoned Deutsch and told him he was interested in Richard Packing. As there were only a small number of shares outstanding he told Deutsch: "If you see any stock, please show it to me." Over the next year Deane purchased between eight and twelve thousand shares of Richard Packing stock for himself and his clients. He purchased a number of these shares from KAB, a New York brokerage house (Tr. 586-88).

2. KAB: the 30% kickback arrangement through the Reiss Bank, Zurich, Switzerland

KAB opened for business on September 13, 1968. Bernard Shwidock, the President of KAB, began making a market in Richard Packing stock on that date on the recommendation of Deutsch and Duboff.* Approximately one week later, Duboff called Shwidock and asked him to come over to Jaffee & Co. There, Duboff told Shwidock, in the presence of Deutsch, that "they did a tremendous amount of business and very heavy volume" and asked if KAB would "be interested in handling some of it."** Duboff further stated that they didn't "give away all this business for nothing" and demanded a kickback of 50% of the profits in cash. Shwidock responded that he would have to talk it over with his partner, Daniel Driesman (Tr. 904-05, 912-15, 919-21).

Driesman liked the idea but told Shwidock that it would be impossible to hide a 50% cash "kickback" on the books. He suggested that they could probably absorb a 30% cash "kickback" by charging these payments off to legal fees and general office expenses. Shwidock returned to Jaffee & Co. the following day and related his conversation with Driesman to Deutsch and Duboff. Agreement on the 30% figure, payable in cash at the end of each month, was thereupon reached. In addition, Duboff instructed Shwidock that he and Deutsch would do all the trading for KAB in the selected stocks. In other words, they would tell Shwidock "how to buy and how to sell, when to buy and when to sell, etc." (Tr. 922-23).

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* Shwidock had known Deutsch and Duboff since approximately 1961 (Tr. 904-05).

** Jaffee & Co., a "very strong financial house" with "very strong buying power", held a prestigious position in the securities market in 1968-69 (Tr. 3194). During this period "the stocks that they were involved in had sharp fluctuations upward" (Tr. 4866).

Over the next several months, approximately 18,000 shares of Richard Packing stock were traded by KAB. These purchases and sales were directed by either Deutsch or Duboff. For example, Shwidock would receive a telephone call from one of them notifying him that he had just sold a certain number of shares of Richard Packing, at a specific price to a designated broker. Shwidock would then call the broker to confirm the sale for his own records. Purchases of Richard Packing stock were made in the same manner. As a result of directed trading in Richard Packing stock alone, KAB made a profit of approximately $50,000. Thirty per cent or approximately $15,000 was "kicked back" to Deutsch and Duboff (Tr. 924-2[illegible], 1023; GX 20A).

In early October, 1968, shortly after this 30% "kickback" arrangement was agreed upon, Shwidock was again called to Jaffe & Co. by Deutsch and Duboff. When he arrived, he was directed by Duboff to meet Deutsch upstairs in another office. After meeting Deutsch, Shwidock was taken into an inner office where he was introduced to a Mr. Jack Reiss, President and Chairman of the Board of the Reiss Bank in Zurich, Switzerland. This meeting lasted a minute or two, with Reiss and Shwidock exchanging amenities. Shwidock was then ushered out and instructed by Deutsch to return downstairs to see Duboff at Jaffee & Co.

When Shwidock returned, Duboff informed him that the Reiss Bank was one of their "big accounts" and that he wanted to use the bank to facilitate payment of the 30% "kickbacks". He suggested that KAB subscribe to an investment advisory service from the Reiss Bank for approximately $10,000 a month. Payment would be made by checks directly to the Reiss Bank in Zurich. Duboff further explained that Shwidock could file the service reports and other materials received and write off the pay-

ments against statistical services. After consultation with Driesman, Shwidock agreed (Tr. 927-31).

Shortly thereafter KAB began receiving various types of printed newsletters, pamphlets and market reports from the Reiss Bank. This material, utterly useless so far as KAB was concerned, related in general to the commodity markets in Europe, including information as to the gold, platinum, cotton, soybean oil and sugar markets. KAB also received telexes from the Reiss Bank giving quotations for various stocks and bonds traded in the European market. KAB, however, never did any business in commodities or in European stocks. When this material was received, Shwidock immediately placed it in a folder and filed it away, where it remained unused. For this "service" KAB sent five checks to the Reiss Bank totalling $90,000 (Tr. 931-32, 967-70; GX's 21A-21GG, 22A-22J, 24A-24E).*

Deutsch and Duboff also utilized other devices to reap the benefit of the 30% "kickback" from KAB. In the latter part of 1969, Duboff called Shwidock and related that he had purchased some paintings from a studio and that he was sending the bill to KAB for payment. Duboff thereafter picked up the art work which had been delivered by the studio to KAB. Similarly, Deutsch telephoned Shwidock in the latter part of 1968 and instructed him to pay a couple of his bills that he was sending from a store called Guys with Buys. He instructed Shwidock to charge it off "to office expense and against the 30 percent cash that we were to give back (Tr. 993-99; GX's 25A and 25B).

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* Richard Packing was just one of several stocks traded by KAB for which 30% of the profits was "kicked back" to Deutsch and Duboff. For example, KAB made approximately $100,000 profit in the trading of the stock of Status Marketing. Thus, approximately $30,000 was kicked back to Deutsch and Duboff for trading profits in this stock (Tr. 1584-85). Accordingly, the checks payable to the Reiss Bank included "kickbacks" for stocks other than Richard Packing.

In January, 1969, Deane telephoned Deutsch and related that he and some of his customers were concerned about the recent downtrend in the price of Richard Packing—"from the early 30s to, roughly, the mid 20s—and were thinking of selling." Deutsch replied:

> "'Hugh, don't worry. Big things are happening here. We are about to close on Value Line', which is a large mutual fund and they were about ready to take a sizeable position in the company, 'and I want the stock at 28 to 30 and ultimately much higher, and I suggest that you buy more and I am going to buy more behind you'" (Tr. 591).

Over the next several weeks, Deane, rather than selling, purchased several hundred additional shares of Richard Packing stock, usually after he received telephone calls from KAB apprising him of the availability of the stock (Tr. 590-91). The price began to rise immediately, and in February the Value Line Special Situations Fund, Inc. ("Value Line"), a large mutual fund, agreed to purchase 50,000 unregistered and unissued shares of Richard Packing at $28 per share for a total price of $1,400,000* (Tr. 2513).

3. The Regulation A Offering

In addition to the private placement with Value Line, Deutsch also arranged a 10,000 share Regulation A offering for Richard Packing which became effective on March 11, 1969. The offering circular issued in connection with this offering was prepared by Alvin Malmon, counsel for Richard Packing, and was scrupulously reviewed by Cohen "line by line" before release (Tr. 84-89). Among other things, it was represented in pertinent part in this offering

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* Prior to Value Line's commitment, Deutsch falsely represented to O'Meara that Richard Packing had already sold "a large number of" franchises and would have "at least 150 units operating by the end of the year" (GX 2).

circular that "the offering is not underwritten, and the company proposes to offer the shares . . . by its directors, officers and employees . . ." (GX 5B at p. 1). It was further represented in this circular that the offering was being made to the "public" at a price which would "depend upon the market price of the shares at the time of sale" and that "the Company has no assurance that all or any part of the stock offered will be subscribed for . . ." (GX 5B at p. 3). In fact, the offering was underwritten by Deutsch, Duboff, Shwidock and KAB. Moreover, the price of $28 per share was arranged prior to the effective date, and the shares were sold to accounts selected by Deutsch and Duboff, rather than being offered to the public.

In January, 1969, Deutsch told Shwidock that "Richard Packing Company was planning an offering, a Reg A offering, and that Kelly, Andrews & Bradley would be the underwriters" (Tr. 1036). About a week later, Deutsch changed plans and instructed Shwidock that the offering was not going to be underwritten but instead would be sold by the company itself, with KAB merely sending out the confirmations (Tr. 1037-38).

In February, 1969, Shwidock was introduced to Cohen by Deutsch and Duboff at the Hilton Hotel in New York City, at a mortgage brokers' convention. Deutsch explained that KAB would send $280,000—the proceeds of the Regulation A offering—to Cohen at Richard Packing. Shwidock and Cohen both agreed (Tr. 1039-41).

Approximately one week later, Shwidock called Deutsch and asked if he could have Richard Packing confirm his understanding with Cohen in writing. Deutsch responded that he would have Cohen call Shwidock in a few minutes. About ten minutes later, Cohen telephoned Shwidock and told him he would be receiving the requested confirmation letter in "about two days" (Tr. 1041-42). The letter signed by Cohen arrived as promised, and read in part:

> "As per our conversation we expect that the registration of 10,000 shares of Richard Packing Co. should be effective around the week of March 10. I would appreciate your handling of the sale. We would not expect to get less than $28.00 per share" (Cohen F).

The Regulation A offering became effective on March 11, 1969. The 10,000 shares were distributed by Shwidock at KAB, pursuant to the direction of Duboff as follows:

(a) March 14, 1969—1000 shares at 28 to the firm trading account of KAB (Tr. 1043; GX 14A).

(b) March 18, 1969—1000 shares at 28 to the firm trading account of KAB (Tr. 1044-47; GX's 14B and 15A).*

(c) March 18, 1969—5,000 shares at 28½ to Loeb Rhoades & Co., clearing for Jaffee & Co., for the account of the Financial Venture Fund in Denver, Colorado (Tr. 1044-46; GX 16).

(d) April 3, 1969—1500 shares at 28¼ to KAB for the account of Harry Morginstin (Tr. 1049-53; GX 17A).

(e) April 3, 1969—1500 shares at 28¼ to KAB for the account of William Harris (Tr. 1049-53; GX 18A).**

Morginstin and Harris are the brother-in-law and father-in-law of Deutsch and Duboff, respectively. Each main-

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* Fifteen hundred of the 2,000 shares placed in the firm trading account of KAB at $28 per share were delivered, pursuant to the direction of Duboff, to Gemma Securities, a brokerage house, against sales previously made of 900 shares at 29½ and 600 shares at 30. The remaining 500 shares were sold at Duboff's direction to A.J. Butler, Co., a brokerage house, on March 18, at 31 (GX 15B).

** The ½ point on the purchase by Financial Venture Fund through Jaffee & Co., and the ¼ point on the Morginstin and Harris transactions, represent the commission received by KAB on these trades.

tained discretionary brokerage accounts at KAB. These accounts were traded exclusively by Deutsch and Duboff through directions they gave to Shwidock (Tr. 1055-57). Morginstin testified that he never heard of KAB. Nor did he have any independent recollection whether he made $5,000 or $150,000 in trading profit from that account in 1968 (Tr. 3383-84, 3409-11). Harris, 77 years of age, maintained a checking account at Manufacturers Hanover, in which proceeds from his stock transactions were deposited by Duboff. Duboff maintained the blank checks and other records for this account and had the authority to draw checks in Mr. Harris' name. Harris never drew or signed a check on this account but was provided with money from Duboff when he needed it (Tr. 3471-73).*

As prearranged by Deutsch, KAB sent four checks totalling exactly $280,000 to Richard Packing as the proceeds of the Regulation A offering** (Tr. 1053; GX's 19A-19D). KAB, whose limited function in the Regulation A offering was supposedly the sending out of confirmations, made a trading profit of $4,050.00 and commissions of $4,313.20 on this Regulation A offering. Deutsch and Duboff made 30% of this trading profit or $1,215.00. Mor-

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* Moreover, in September, 1968, Morginstin and Harris each was issued options to purchase 5000 shares of Richard Packing stock at $6 a share. At the same time several others were given similar options at $15 a share. These options were granted by Richard Packing for "services rendered to the corporation and to be rendered." Prior to the issuance of these options, Cohen explained to Alvin Malmon, Richard Packing's counsel, that people receiving options at the lower price rendered more valuable service to the company than those receiving options at $15 (Tr. 109-10; GX's 5B and 6). Morginstin, however, testified that he never performed any services for Richard Packing (Tr. 3381). By stipulation it was agreed that Harris never even heard of Richard Packing (Tr. 3472-73).

** By letters dated March 17 and March 19, 1969, *prior* to the completed distribution of the 10,000 shares by KAB, Cohen directed his transfer agent to issue *all* the shares to KAB (GX's 9A and 9C).

ginstin and Harris each sold his 1,500 shares—which had been deposited in their respective accounts at 28¼ on April 3, 1969—three days later at 32⅞, netting each a profit of $6,330.90 (GX's 20 and 47).

4. The Denver Funds

Financial Venture Fund (FVF) became operative on March 10, 1969, a day before the effective date of the Regulation A offering. As a result of a management shake-up at Financial Programs, Inc., the management adviser for the Denver Funds, Jack Hurley, who had previously been a systems engineer with IBM, and who had limited investment experience, was promoted to the position of portfolio manager of FVF.* Hurley was given $45,000,000 to invest in "unseasoned companies" (Tr. 1816-26). On March 18, 1969 Hurley made his initial purchase of Richard Packing stock through Deutsch—5000 shares, or half the available shares from the Regulation A offering. By April, 1970—one year later—FVF and its associated funds, Financial Industrial Fund and Financial Dynamics Fund, held 156,000 shares of Richard Packing or approximately 75% of the publicly traded shares (GX's 50-63).

Deutsch first met Hurley on February 1, 1969, in Denver through Hugh Deane.** Deutsch described his interest in Richard Packing and the company's proposed franchise program. For example, he indicated that Richard Packing would have 60 Circus Wagon Restaurants sold and built by the end of the year (GX 33). He further projected that

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* Several employees of Financial Programs with considerable investment experience had recently left the company prior to Hurley's promotion (Tr. 1820-23).

** In the latter part of 1968, Deane, after learning that Hurley would soon have "30 to 50 million dollars" to invest, related to him that Jaffee & Co. had "a very fine record with a number of extremely unusual stocks," including Solatron and Leasco Data, and that they were then interested in Richard Packing which Deutsch "was really behind and trying to build" (Tr. 591-95).

the company would earn $.40 a share as of June, 1969, with earnings at a rate of $3 the following year and $5 to $7 the year after (Tr. 1829-34; GX 33).* Shortly after this meeting, in February or early March, 1969, Deutsch telephoned Hurley and informed him of the pending Regulation A offering. Deutsch related that Richard Packing stock was selling in the 30s but that the offering would be below that. He invited Hurley to participate in this offering and told him the "stock should go up thereafter" (Tr. 1839-41). Thereafter, on March 18, Hurley made his initial purchase of 5000 shares of Richard Packing at 28.

At about this same time—in February or March 1969—Deutsch and Cohen met with Michael Papworth, a 26-year-old trainee and assistant Portfolio Manager at Loomis, Sayles & Company, a national investment counseling firm in Los Angeles. They provided Papworth with detailed information on Richard Packing. Papworth then compiled a report in his spare time based on this information. Papworth had never before prepared a financial research report (Tr. 2300-07).

This report, among other things, contained the following information:

> "The company recently entered into an agreement to acquire F&T Meats of New York who are substantially in the same business as Richard. Sales and earnings of $1.2 million and $80,000 respectively are anticipated for June 30, 1969. F&T had sales of $900,000 for the year ended December 31, 1968. Richard plans to issue a total of 20,000 shares for F&T depending upon the latter's achieving certain sales and profit levels in the future. Contacts indicate the principals of F&T are experienced in the

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* Richard Packing reported earnings of $.05 per share for the fiscal year ending June 30, 1969 (GX 13A).

meat processing business and Milton Cohen indicated the central reason for the acquisition was F&T's capable management" (Deutsch A).

Oscar Feldhamer, who operated F&T Meats with his brother David, in Brooklyn, New York, testified that, while Deutsch and Cohen offered him 20,000 shares of Richard Packing for F&T Meats, he had rejected the offer and that no agreement was ever reached or signed (Tr. 2343-50).

Papworth completed his report on March 18, 1969. The report was prepared for his own personal experience and training and was not intended for distribution. He gave a few copies to friends, and to Deutsch and Cohen for their evaluation. Deutsch and Cohen each complimented him. Deutsch then forwarded a copy to Hurley at Financial Programs (Tr. 1868-69, 2308-11). By the end of March, 1969, the Denver Funds had purchased 16,800 shares of Richard Packing stock (GX 50).

The Denver Funds purchased every share of Richard Packing through Jaffee & Co., their broker. Deutsch spoke with Hurley in the spring of 1969 and stated that if they purchased the shares from Jaffee & Co. they would receive the lowest possible price, because they knew who held the publicly traded shares. Consequently, the bulk of the orders given to Jaffee & Co. by the Denver Funds for Richard Packing stock were at "market order not held", which gave Deutsch and Duboff full discretion as to the price at which each order was executed (Tr. 4882; Duboff Y). Over the next year the Denver Funds paid Jaffee & Co. $43,602.91 in commissions in connection with their purchases of Richard Packing stock. Deutsch and Duboff evenly split 40%, or about $17,500, as their share of the business (Tr. 1863-64, 2644-49; GX 50).

In approximately May, 1969, Deutsch telephoned Hurley again in Denver and told him that Richard Packing

stock was going to be split. Deutsch asked Hurley if he had any suggestions as to just how this should be accomplished. When Hurley asked whether it made any difference how the stock was split, Deutsch replied affirmatively. For example, Deutsch explained, if you split the stock 5-for-4, anyone holding 100 shares would own 120, or an odd number of shares thereafter. If you split the stock 2-for-1 then this same person would own 200 shares afterwards. Deutsch explained that with the odd ratio or 5-for-4 split the person owning 120 shares would be more inclined to sell off 20 shares or purchase an additional 80 "to round themselves out." In either case this would "cause activity in the stock, which increases the supply and the demand at the same time" (Tr. 1858-60). Richard Packing had two successive 25% stock dividends thereafter —the first effective May 29, 1969, the second, August 2, 1969 (Tr. 129-31; GX 10). By the end of May, 1969, the Denver Funds held 27,800 shares of Richard Packing stock (GX 50).

The first franchise restaurant opened for business in July, 1969. Just prior to the opening, James Giasafakas, an employee of Financial Programs, met with Deutsch in Minnesota. Deutsch, among other things, told Giasafakas that Richard Packing had sold over 200 such franchises by that time (Tr. 2447, 2454). By the end of July, the Denver Funds held 44,700 shares of Richard Packing stock (GX 50).

5. Richard Packing's deteriorating financial condition

In April, 1969, Richard Packing entered into a contractual relationship with Bass & Company, a public relations firm in New York City. A series of press releases were ultimately prepared and distributed by Bass & Company to the financial community, including the Denver Funds (Tr. 2463-66, 4011-15; GX's 31A-31E and 31G). These releases, which were approved by Cohen, Deutsch

and others before distribution, generally depicted Richard Packing as a growing, successful company (Tr. 4016-17). They announced, among other things, the payment of stock dividends, the $1.4 million private placement with Value Line, various acquisitions including that of a dune buggy company in California and of Bill Cosby Foods, Inc., and the number of franchise contracts sold up to the date of each release.

In fact, Richard Packing was beset with financial and other problems, during 1969 and 1970. Most of these problems were associated with rising construction and real estate costs, and Richard Packing's inability to come up with adequate financing (Tr. 2746-47, 2893-95, 4650-54). In addition, owing in part to Richard Packing's poor performance in fulfilling its construction obligations, many franchisees cancelled their contracts and their money was returned. Moreover, Status Marketing, the sales organization responsible for selling Richard Packing franchises went bankrupt (Tr. 2741-48, 3910-11; GX 13B-1). Without the sale of its meat packing facilities, Richard Packing would have lost approximately $51,000 or $.06 a share by June, 1970 (Tr. 3862-67). None of this information was contained in the press releases which were issued by Richard Packing. Nor was it revealed in these press releases that, while Richard Packing was encountering severe financial problems with its franchising operation, the company had advanced over $1,000,000 to its subsidiary Resort Products to finance a dune buggy operation (Tr. 3876-80).

6. The 1969 Annual Report

While Richard Packing continued to send out "bullish" press releases to the financial community, the Annual Report for the fiscal year ended June 30, 1969, was not distributed until the following summer (Tr. 4952-56; GX 89). In February, 1970, Hugh Deane called Deutsch and told him that St. Croix Associates, his largest account in Richard Packing stock,

> "was very concerned because they had not received the June 30, 1969 annual report, and that they could not evaluate the financial position or condition of the company relative to the 200 franchises that were supposed to have been sold at that time, and been able to project meaningful earnings, and that they were nervous and concerned about the stock."

Deutsch replied:

> "Don't be concerned, Hugh. Forget about the annual report. It is not significant. I have 15 to 20 million lined up to handle the 200 Richard—the circus wagons that we have sold" * (Tr. 604-05).

Deane also asked Cohen on several occasions, as did Gerald O'Meara from Value Line, for the 1969 Annual Report or other current financial information. Cohen always responded that the information would be forthcoming (Tr. 606-07, 2541-42). Similarly, Hurley, beginning in July or August, 1969, asked Deutsch on numerous occasions when the financial reports for Richard Packing were coming out. Deutsch always assured him that "it would be coming" (Tr. 1869-72). In February, 1970, Hurley asked Deutsch why the company "wasn't doing as well as it was supposed to be doing . . . why had not as many franchises been sold as had been projected. . . ." Deutsch responded that the financial reports "would be on the way." At that point Hurley said he felt like selling all his Richard Packing stock. Deutsch then asked him: "[C]ouldn't he [Deutsch] get out first"? Hurley walked away (Tr. 1872-76).

By letter dated March 19, 1970, Cohen instructed Bass & Company as follows with respect to the 1969 Annual Report:

> "I want the finished year-end statement to be mailed to Richard Packing Company, 790 So. Cleveland at the cheapest rate of mailing.

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* Richard Packing never received this money (Tr. 4779).

> We will distribute them to stockholders from this office.
>
> I DO NOT wish this statement to be distributed to any media whatsoever. Only our stockholders are receiving this report and we will do that distributing. Please make sure these instructions are followed to the letter. Please call me if you have any further suggestions" (GX 84).

When the 1969 Annual Report was finally released in July, 1970, it contained a "message" to shareholders by Cohen, dated April 16, 1970, which stated: "To date, commitments for 82 franchises have been secured by Status Marketing" (GX 13A at p. 5). In the final press release dated April 6, 1970, *just 10 days carlier,* Richard Packing made the following announcement to the financial community: "Richard Packing has to date sold 210 franchises . . ." (GX 31G).*

The Denver Funds purchased additional shares of Richard Packing stock in late April, 1970, following the issuance of this press release, bringing their total up to 156,000 shares or approximately 75% of the "float", i.e., the publicly traded shares. The Denver Funds never received the 1969 Annual Report. They sold these shares at $1 a share in July and August, 1970, thereby incurring a loss of approximately 5.1 million dollars (Tr. 1869, 2474; GX's 63A-63G). Cohen, on the other hand, made close to half a million dollars by selling his own shares at gradually rising prices, while the Denver Funds were still purchasing Cohen had originally paid approximately 17 cents a share for his stock (GX 48).

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* Similarly, by letter dated March 17, 1970, Cohen advised O'Meara that as "of March 4th we had gone to two hundred (200) franchises" (GX 4).

7. The trading of Richard Packing stock

Two brokerage houses—V.F. Naddeo and New Dimension—supplied Deutsch and Duboff with the bulk of the shares of Richard Packing that were sold to the Denver Funds. By March, 1969, when the Denver Funds began purchasing Richard Packing stock, KAB had encountered severe financial problems and was suspended for a short period by the National Association of Securities Dealers because of a net capital violation (Tr. 1425). Thereafter KAB conducted very little business in Richard Packing. V.F. Naddeo sold approximately 40,000 shares of Richard Packing to Jaffee & Co. for the account of the Denver Funds from March through October, 1969. New Dimension, which opened for business in December, 1969, supplied approximately 45,000 shares of Richard Packing to Jaffee & Co. for the account of the Denver Funds from that date through April, 1970 (GX 50).*

a. V.F. Naddeo—March, 1969-October, 1969

Fred Mazzeo, a trader at V.F. Naddeo, and named in the Information as an unindicted co-conspirator, was introduced to Deutsch in mid-1968 by a mutual friend. Mazzeo, impressed with the strong buying power of Jaffee & Co., expressed the desire "to get involved with Mr. Deutsch in the trading of stocks that he had an interest in. . . ." Deutsch told Mazzeo that he would contact him in the future. Duboff subsequently telephoned Mazzeo before the Denver Funds started purchasing shares of Richard Pack-

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* From October 24, 1969, when V.F. Naddeo stopped trading with Duboff, until New Dimension opened for business in December, Jaffee & Co. purchased 3500 shares of Richard Packing stock for the account of the Denver Funds from Alessandrini & Co., a New York brokerage house. Alessandrini, however, purchased 2200 of these shares from V. F. Naddeo and raised the price on each share ½ point to Jaffee & Co. (GX's 50 and 86). Moreover, during this time period Alessandrini's only customer for Richard Packing stock was Jaffee & Co. (Tr. 4207-08).

ing and told him that he wanted V.F. Naddeo to trade and make an active market in Richard Packing. Duboff further stated that he would be principally a buyer in the stock and to "reflect to him" whatever Richard Packing was "shown" to Mazzeo (Tr. 3191-95).

Mazzeo testified that 30% to 50% of the trades made by V.F. Naddeo in Richard Packing were made as follows: Duboff, or occasionally Deutsch, called Mazzeo, placed an order for a specific quantity of Richard Packing stock, and then directed Mazzeo to a specific brokerage house to obtain the stock for Jaffee & Co. Mazzeo would then either call this other house to which he was directed by Duboff or the firm would call him.* For example, Duboff, on behalf of Jaffee & Co., would give Mazzeo a bid of 37½ for Richard Packing and then instruct him either to call Bernard Shwidock at KAB or to expect a call from Shwidock, who would provide him with the stock to fill the bid at 37¼ (Tr. 3196-3201).

Mazzeo, with two assistants, traded approximately 110 stocks during 1969, executed about 600 orders per day and spoke with at least 100 brokers daily. None of these brokers except for Duboff and occasionally Deutsch, placed an order with him for stock and then directed him to another house to fill the order. In late October, 1969, Duboff telephoned Mazzeo and expressed dissatisfaction because Mazzeo, when he did not have a specific order from Jaffee & Co. for stock, was not "maintaining the market" in Richard Packing that Duboff wanted. A heated argument ensued and Mazzeo informed Duboff that he was "dropping the stock." The last purchase of Richard Packing by Jaffee & Co. from V.F. Naddeo—400 shares—occurred on October 24, 1969 (Tr. 3201-03).

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* On those occasions when Mazzeo was not directed by Duboff to a specific house to fill his order for Richard Packing stock Mazzeo relied on V.F. Naddeo's status as "one of the top firms in the Street" to attract a seller (Tr. 3199).

b. New Dimension Securities

(i) Formation

In July, 1969, Hurley met with Deutsch in Las Vegas. At that time Deutsch told him that "he and Stanley [Duboff] were not too happy at Jaffee & Co. and that they were thinking of opening a new brokerage business. . . ." * Deutsch asked Hurley to join them. Hurley responded, however, that he was not interested in relocating to New York City (Tr. 1898-99).

In the fall of 1969, Somer Jack Rothman, an old friend of Shwidock, informed him by telephone that he was going to work for a new firm called New Dimension as a cashier, and that "Bernie and Stan were behind the company" (Tr. 1079-80). On December 4, 1969, New Dimension opened for business at 17 Battery Place, New York in a two-room office with three employees: Stanley Ryback as President, Rothman as cashier, and Elizabeth Danford as secretary. Ryback, who had previously operated a variety store in Brooklyn known as Guys with Buys, had no prior experience in the securities business (Tr. 3492-94).

Shortly after New Dimension opened for business Deutsch spoke with Hurley by telephone and told him that "the brokerage house that he had mentioned in the summer was open". He further indicated that "there was a man there running it, who had sold a store and put up the money to open the brokerage house. . . ." He suggested that Hurley come in with Paul Pfluger, a mutual fund manager in Los Angeles, to "discuss the west coast operation of this brokerage firm" (Tr. 1899-1901).

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* Earlier that summer Deutsch and Duboff offered to buy a controlling interest in KAB. Their offer was refused (Tr. 1075-77).

In January, 1970, Hurley and Pfluger met with Deutsch, Duboff and Ryback at the Regency Hotel in New York City. Hurley and Pfluger indicated an interest in joining New Dimension but said they wanted a percentage of the business rather than being mere employees. Deutsch and Duboff agreed to this arrangement. Deutsch then took a small piece of Regency Hotel stationery and allotted the percentage ownership of New Dimension as follows: Deutsch—26%, Duboff—26%, Ryback—5%, Cohen—12%, Deane—5%, Rothman—1% and Hurley and Pfluger were to split the remaining 25% (Tr. 1901-07; GX 37).

Hurley and Pfluger accepted the offer and later went to work for New Dimension in Los Angeles.* Neither Hurley, Pfluger nor Rothman ever received any percentage ownership of New Dimension. Shortly after New Dimension commenced business, Richard Packing opened the largest customer account in the firm with a check signed by Cohen, dated December 31, 1969, for $200,000. This check was deposited in the New Dimension bank account. No trades were ever made for the account and the money was ultimately refunded to Richard Packing in five installments (Tr. 1916-17, 3514-22, 3524; GX's 71A-71F).

(ii) Trading

Jack Rothman, an unindicted co-conspirator who had been promised immunity in exchange for his testimony, executed approximately 25% of New Dimension's trades in Richard Packing with Jaffee & Co. from December, 1969 through April, 1970. Rothman testified that these trades were executed as follows: either Deutsch or Duboff called

* Hurley left the Denver Funds in June 1970 to join the west coast branch of New Dimension. During the time that Hurley was employed at New Dimension, he received instructions on the work he performed from Deutsch and Duboff (Tr. 1916, 1968-69).

and directed that "'I'm selling them,' for instance, '1000 shares of Richard Packing' at a certain price and that I should go out to a broker which they would name to me to pick up the stock at another price and, in turn, they would buy it from us at the price that they set originally." Or, they would telephone and tell New Dimension "to go out into the street, meaning to call other brokers, and clean up the street, which means to buy as much Richard Packing as I can at a certain price and then, in turn, I would call them back and tell them how many shares I bought and they, in turn, would buy the stock from us at a price that they set" (Tr. 3483, 3503-13).

During this time period—the fall of 1969 and early part of 1970—the stock market was doing very poorly. Perry Leff, a cable television executive from Los Angeles, who had earlier purchased Richard Packing and other stocks through Deutsch, visited him in New York during the fall of 1969. Leff maintained that it seemed remarkable that "although the stock market was then declining rather precipitously, all of the securities which Mr. Deutsch had purchased for me had maintained the price level." Deutsch responded:

> "'Why are you so surprised? When the supply of the stock has been dried up,' you know—'I have been able to place the major portion of the supply of the stock with the Denver Funds and other funds and when there are no shares available on the open market, it is not at all surprising that the price level would be maintained'" (Tr. 2411-12).

Deutsch had previously explained his relationship with the Denver Funds to Leff, after Leff expressed some displeasure over their treatment of him in another business transaction, as follows:

> "Don't concern yourself about that. They are not betting on the horse, they are betting on the jockey.

> If I chose you and selected you, that is good enough for them.
>
> I have done very, very well for the fund and they trust my judgment. And I will subsequently work out whatever details you feel are required" (Tr. 2408-10).

By the beginning of 1970, Richard Packing stock, after two stock splits, was trading at approximately $45 a share in spite of the declining market. James Ledbetter, an investment advisor in New York City, who had purchased 2000 shares of Richard Packing in 1967 at $7 a share—a price unadjusted for the subsequent stock splits—telephoned Deutsch at this time and asked him to sell these shares. Deutsch advised him that this would be a big mistake. He stated that he "knew where every share of the stock was, how much stock I [Ledbetter] owned, and he said there was a fund group that were consistent buyers of the stock, in Denver, and that anytime the stock dipped or he needed to place the stock, he had a place for it in Denver." When Ledbetter expressed surprise as to "how the stock is staying up here with the market so weak", Deutsch responded: "Jim, don't worry about it. That stock is going to par." In the parlance of Wall Street, "par means a hundred" (Tr. 4448-49). Consequently, as he understood that "the stock was pretty well under control by Mr. Deutsch's firm" he decided not to sell his 3,225 shares. In July, 1970, he attempted to sell these shares with the market "around 7 or 8." He was unable to do so (Tr. 4446-51, 4474).

(iii) Trading profit in Richard Packing—the Townhouse

By July 31, 1970, New Dimension, despite the poor market conditions prevailing at that time, made approximately $115,000 in the trading of Richard Packing stock alone (Tr. 3524). This was accomplished by Duboff and

Deutsch directing New Dimension to sell them shares of Richard Packing for the account of the Denver Funds at generally $2 to $3 a share more than New Dimension was paying for such stock on any given day (GX 83). This profit was to a large extent utilized by New Dimension for monthly rent payments and restoration costs on a townhouse located on East 38th Street in New York City, which was owned by Deutsch and Duboff. In fact, New Dimension never occupied space in this building.

The townhouse was purchased by Deutsch and Duboff for $275,000 under a partnership called DH and DF Company, formed by them for that purpose. A ten percent down payment of $27,500 was paid by the DH and DF partnership. The balance of $247,500 was paid by two checks furnished from the checking accounts of William and Rose Harris, Duboff's in-laws, and H. Morginstin, Deutsch's brother-in-law * (GX's 80, 80A-2 and 81).

In early April, 1970, Ryback informed Rothman that New Dimension would be moving into the townhouse on East 38th Street. He also instructed Rothman to make out certain checks in connection with taking over the lease on the townhouse, including a $20,000 check for the assignment of the lease, a $10,000 check for deposit on the lease, and a $2,000 check for April's rent. New Dimension, however, never moved into this townhouse but remained at 17 Battery Place. Nevertheless, New Dimension continued to pay a monthly rental of $2000 for space it never occupied. This was in addition to the monthly rental of $500 it simultaneously paid for its offices at 17 Battery Place (Tr. 3572-86, 3617; GX's 73A-73E).

In spite of the fact that New Dimension never occupied this townhouse, Rothman was instructed by Ryback to make

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* Deutsch and Duboff, as noted above, had previously placed 3000 shares of the 10,000 share Regulation A offering into the accounts of Morginstin and Harris.

certain payments for restoration of this house. By July 31, 1970, *three* checks totalling $25,000 had been paid by New Dimension to Ralph Yandoli for carpentry and other work on the townhouse, including installation of a swimming pool and sauna. On June 25, 1970, a check in the amount of $2,772 was drawn to "Felures" for laying a floor in the townhouse (Tr. 3587-93, 3607-17; GX's 74A-74C and 76).

In addition, on June 23, 1970, Rothman was instructed by Ryback to make out a New Dimension check to Pincus Decorators for $6,200 and was told that the bill would be forthcoming. A short time later the bill arrived indicating the sale of household furniture, including that for a child's bedroom to "Stanley Ryback, c/o New Dimension." Neither the townhouse nor the offices at 17 Battery Place had a child's bedroom. Rothman inquired of Ryback when this bill arrived as to who was receiving children's bedroom furniture. Ryback responded, "Don't worry about it." The bill from the files of Pincus Decorators, introduced at trial, revealed that these furnishings had been sold to "Mrs. S. Duboff, 123 West Lake Shore Drive, White Meadow Lake, N.J." Stanley Duboff resided in that community at the time (Tr. 3617-21; GX's 75A, 75B and 82).

Frank Austin, a professional interior designer, was retained by Deutsch to furnish, decorate, and supervise the construction and remodeling of the townhouse in late 1969 or early 1970. The total cost of the work he ultimately did was approximately $300,000-350,000.*

Austin's written proposals and billings were made out for and contained the names of Deutsch and Duboff. In June, 1970, Deutsch and Duboff directed Austin to substitute "Dimension Management" for their names on these

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* Austin previously decorated the offices utilized by New Dimension in California, at Deutsch's direction, for approximately $100,000.

documents and to redo the previous billings and proposals contained in his files to reflect this change. On one such proposal (GX 77), the names Deutsch and Duboff were "whitened" out and "Dimension Management" typed over it * (Tr. 4359-61).

Following this meeting in June, Austin commenced billing work at the townhouse to Dimension Management. However, various rooms in the townhouse referred to in these proposals, and other related documents, such as work sheets, purchase orders and invoices were to "Mr. Deutsch's office" or "Mr. Duboff's office". In July, 1970, Deutsch and Duboff directed Austin to redo these proposals and other documents and remove any reference to them in connection with his work on the townhouse (Tr. 4361-62; GX's 78A-78V and 79A-79G). In late 1972 or early 1973, Austin was again told to change all the billings in his files to New Dimension and to destroy all his other records relating to the townhouse. Deutsch at that time told Austin he would pay him what he owed for the work he did, but that Ryback would have to sign the checks (Tr. 4412).

C. The Defense Case

None of the defendants testified in his own behalf. The defense, however, called eight witnesses: Gloria Segal, Dean Faris, David Feldhamer, Allan Dudovitz, William Louder, Harvey Pohl, Leonard Mayer and Somer Jack Rothman.

Cohen called his secretary, Gloria Segal, who testified that she mailed out Richard Packing's Annual Report for the year ended June 30, 1969 to the company's shareholders sometime in the spring of 1970 (Tr. 4579-81; GX 13A).

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* When held to the light the names "Deutsch and Duboff" are visible.

Dean Faris, former Vice-President of Status Marketing, was called by Cohen and testified that he counted the number of franchises sold by the territory involved (Tr. 4615-17). Faris further testified that he had no independent recollection of the number of franchises sold as of March, 1970, but that upon having his recollection refreshed he recalled in a vague manner that "approximately 180" franchises had been sold as of March, 1970 (Tr. 4621-22). He indicated that negotiations were commenced in or about March, 1970, with a prospective New York franchisee for approximately 40 franchises, but that the transaction was never consummated. Faris, however, testified that he had indicated to Cohen that he thought the New York transaction was "pretty well sewed up" (Tr. 4634). Faris also stated that an assertion by Cohen in a letter to Value Line, dated March 17, 1970, to the effect that "as of March 4th we had gone to two hundred franchises" was an overstatement (Tr. 4639).

On cross-examination, Faris testified that he had communicated to Cohen the various problems that Richard Packing was encountering in its franchise program; *e.g.*, finding suitable locations and rising construction costs (Tr. 4653). Moreover, he acknowledged that there were only about nine franchises in operation as of March, 1970 (Tr. 4656). Faris then answered a series of questions designed to illustrate the way he computed the number of 180 franchises sold by Richard Packing as of March, 1970. For example, he attributed 50 of these 180 units to sales in the State of Ohio. Referring to defendant Cohen's Exhibit Z, the franchise agreement for Ohio, he indicated that it called for the immediate licensing of 20 units. According to this contract, the licensee would have an *option* to enter 30 additional licensing agreements only upon "completion and opening for business of its first 20 units" (Tr. 4700). Faris admitted that his testimony as to the sale of 50 units in Ohio was based on the 20 original units

plus the optional 30. He acknowledged that in fact only two units were actually opened in the State of Ohio (Tr. 4700). Earlier testimony by Faris outlined similar methods used in calculating the number of franchises sold in Pennsylvania and Louisiana (Tr. 4683-86, 4689-92).*

Cohen called David Feldhamer, partner with Oscar Feldhamer in F&T Meats, who testified that a signed agreement had never been reached as to the proposed acquisition by Richard Packing. Although negotiations had progressed to the point where "some kind of understanding" had been reached, Oscar Feldhamer refused the proposed offer by Deutsch and Cohen (Tr. 4715-21).

Allan Dudovitz, a former Richard Packing officer, testified on behalf of Cohen that sometime commencing in the latter part of 1971 until June 1973, Cohen put back about $530,000 into Richard Packing (Tr. 4728-29). Cohen's father had died in 1971, although Dudovitz did not know whether Cohen's father had left a sizable estate (Tr. 4733-34). Dudovitz also testified that the last Circus Wagon franchise closed in the latter part of 1972 and that he was heavily engaged in the dune buggy operation at the time (Tr. 4753-54). Dudovitz also said that he saw a letter to Cohen from a Jack Surnow, which made mention of a financial commitment to Richard Packing in the neighborhood of $20,000,000. No portion of the $20,000,000 was ever received by Richard Packing (Tr. 4765-68, 4774-79).

Cohen also called William Louder, a certified public accountant with Lybrand, Ross Brothers & Montgomery, which had performed services for Richard Packing, to testify to problems in connection with work on the 1969

* Faris testified that in Pennsylvania 30 to 40 franchises had been sold. However, payment on the eleventh and succeeding franchises was contingent on the commencement of construction on the tenth. Construction was never commenced on the tenth (Tr. 4683-87; GX 92).

audit (Tr. 4800-03). On cross-examination Louder testified that the field work had been completed on December 29, 1969, and the accountants' representations were made sometime after March 20, 1970 (Tr. 4803-06). Louder also testified that Richard Packing had entered into six franchise licensing agreements and in addition entered into an "agreement for the execution at future dates of 12 license agreements." He further stated that the change in accounting principles did not affect this computation of franchise units but related only to the manner in which income was to be reported (Tr. 4811-13).

Duboff called Harvey Pohl, whose firm had been retained to perform accounting services for KAB, in an attempt to establish that KAB's payments to the Reiss Bank related to Shwidock's personal foreign business transactions (Tr. 4822-36; Duboff X).

Deutsch called Leonard Mayer, a principal of the over-the-counter firm of Mayer & Schweitzer, who testified as to the customary business practices of a market maker and trader (Tr. 4841-67). On cross-examination, Mayer testified that if a market maker, at the time of the execution of a short sale, knows that there are others who want to sell their shares it would be to his advantage to go short (Tr. 4869). Further, he explained that there is an "even stronger relationship in terms of trust" required between a registered representative and a mutual fund manager than in the ordinary broker-customer relationship (Tr. 4867-68). Deutsch also called Somer Jack Rothman to introduce certain documents relating to silver futures bought by the commodities department of New Dimension, a receipt given to Morginstin in connection with his New Dimension account and a check issued by Deutsch on behalf of DH and DF for $247,200 to New Dimension (Tr. 4905-11; Deutsch's W, X, Y and Z).

D. The Government's Rebuttal Case

The Government called Hugh Clayton, a shareholder in Richard Packing, who testified that he had received the 1969 Annual Report for Richard Packing a few days after July 21, 1970. The envelope received by Mr. Clayton which contained the 1969 Richard Packing Annual Report is postmarked July 21, 1970 (Tr. 4956; GX 89).

ARGUMENT

POINT I

The evidence against appellants was more than sufficient to establish their guilt of the crimes charged.

Duboff and Cohen contend that there was insufficient evidence upon which to base their convictions on each of the four counts.* Deutsch contests the sufficiency of the evidence only as to Count Four. These contentions are without merit since the evidence, when viewed in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Barash*, 412 F.2d 26, 31 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969), and the reasonable inferences to be drawn therefrom amply support the jury's verdict. Cohen also argues that the evidence showed more than one conspiracy. This contention is similarly without merit.

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* As to the three substantive counts the arguments of Duboff and Cohen appear to be premised on the notion that the evidence failed to establish their participation in a conspiracy pursuant to which these substantive offenses were committed. However, this contention is utterly without merit as the evidence outlined below established beyond any reasonable doubt that they were both members of the conspiracy charged, pursuant to which these substantive crimes—submitted to the jury with a Pinkerton charge—were committed.

1. The Evidence at Trial

The evidence established that Deutsch, Duboff and Cohen designed and successfully engineered a long-term fraudulent scheme to artificially raise or manipulate the price of Richard Packing common stock. While Deutsch's and Cohen's major function in the conspiracy was the inducement of others to purchase Richard Packing stock, Duboff's primary role was to direct the daily trading to generate the essential market activity, and ultimately channel over 100,000 shares at gradually rising prices to the Denver Funds.*

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* Duboff takes 46 pages of his brief to analyze the evidence and conclude that it was insufficient to establish his guilt beyond a reasonable doubt. Although the Government did not argue that Duboff made any misrepresentations to the Denver Funds, he spends considerable time arguing that the representations made by Deutsch and Cohen were truthful. These arguments are merely attempts to dispute the Government's evidence and were clearly matters to be resolved by the jury. *United States* v. *Zanfardino*, 496 F.2d 887, 888 (2d Cir. 1974); *United States* v. *Taylor*, 464 F.2d 240, 243 (2d Cir. 1972).

Duboff also spends considerable time attempting to establish that the evidence of Jaffee & Co. purchasing Richard Packing stock from V.F. Naddeo and New Dimension for the account of the Denver Funds did not establish a manipulative scheme. Deutsch's admissions alone with respect to this trading reveal the frivolousness of this contention. In June, 1969, Deutsch explained to Perry Leff that the Denver Funds do what he tells them: "they are not betting on the horse, they are betting the jockey" (Tr. 2410). Later in the fall of 1969, Leff noted how remarkable it was that although the market was declining precipitously, that Deutsch's stocks had maintained their price level. Deutsch explained that "I have been able to place the major portion of the supply of the stock with the Denver Funds and other funds and when there are no shares available on the open market, it is not at all surprising that the price level would be maintained" (Tr. 2411-12). Similarly, in February, 1970, James Ledbetter testified that Deutsch told him that "he knew where every share of the stock was, how much stock I (Ledbetter) owned, and he said there was a fund group that were consistent buyers of the stock in Denver, and that any time the stock dipped or he needed to place the stock, he had a place for it in Denver" (Tr. 4448).

The directed trading of Richard Packing stock at KAB, V.F. Naddeo and New Dimension (with the accompanying evidence of "kickbacks" and siphoned off profits), the false and misleading offering circular relating to the Regulation A offering, and the false and misleading statements made to induce the Denver Funds to purchase 75% of the "float" of Richard Packing stock were each an integral part of a fraudulent scheme to artificially raise the price of Richard Packing stock.

c Directed trading at KAB—the initial step in the manipulative scheme

From September 14, 1968, through March 18, 1969—when the Denver Funds commenced purchasing shares of Richard Packing—a struggling and relatively unknown Minnesota meat patty producer—approximately 18,000 shares, or close to 20% of the entire "float", was purchased by KAB for its trading account (GX's 20; A-20C).* Shwidock testified that he was initially instructed in September, 1968, by Duboff that "all trading in stocks that were designated by either Mr. Deutsch or Mr. Duboff were to be traded by them exclusively. In other words, they were to tell me how to buy and how to sell, when to buy and when to sell, etc." (Tr. 923). During this period, Shwidock, who did as Duboff had told him, was telephoned by either Duboff or Deutsch and told when KAB *had* sold or purchased a specified amount of Richard Packing stock at a designated price. Shwidock would then telephone the broker on the other side of the transaction to confirm the trade (Tr. 925). Georgia Nelson Quinn, Shwidock's secretary, also testified that in his absence she received similar instructions in telephone calls from Duboff and Deutsch (Tr. 269-74).

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* This volume of trading by one brokerage house, especially a small one that had just opened for business, is hardly insignificant as suggested by Duboff (Br. at 112).

In exchange for this business, KAB "kicked back" 30% of its trading profit in Richard Packing stock, or approximately $15,000, to Duboff and Deutsch.* Dubo .rranged for the cash "kickbacks" to be remitted by KAB by checks payable to the Reiss Bank, Zurich, Switzerland, which were written off at his suggestion on KAB's books as payments "against statistical service". Useless statistical information and brochures relating to European stocks and commodities were received by KAB and placed in its files. KAB never did any commodity business or any transactions in European stocks (Tr. 930-32, 967-69, 979; GX's 21A-21GG, 22A-22J, 24A-24E).

During this period, Duboff sold to KAB 10,000 shares of Richard Packing s k from Jaffee & Co.—or 10% of the publicly held shares.** Cohen similarly sold through

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* Duboff, without citing any legal authority, contends that the trial judge committed prejudicial error in admitting evidence of the 30% "kickbacks" paid by KAB to Deutsch and Duboff (Br., Point Six, at 142-45). This claim is frivolous. Clearly, as the trial judge ruled, the profit derived by Duboff and Deutsch in their directed trading of Richard Packing stock through KAB was highly relevant to establish their motive in manipulating the price of the stock.

** On October 4, 1968, Duboff called Shwidock and told him that KAB was buying 5,000 shares of Richard Packing stock at $28 per share from Jaffee & Co. and immediately selling these same shares to two purchasers at $33 per share. On October 7, three days later, Shwidock was again called by Duboff and instructed that KAB was receiving an additional 5,000 shares from Jaffee & Co. at 28, to be sold the same day for prices ranging from 31¾ to as high as 35 (Tr. 1539-41). Duboff, of course, as a registered representative at Jaffee & Co. at the time, could have sold these 10,000 shares directly to these same customers. By directing these trades through KAB, however, he and Deutsch received a 30% kickback on the trading profit, plus commission. Moreover, Duboff and Deutsch, who were closely associated with Richard Packing at the time, would hardly want it known to prospective purchasers of Richard Packing stock that they were acting as brokers for a customer who wanted to sell

[Footnote continued on following page]

KAB 2,500 shares of Richard Packing, on which his basis was 17¢ per share, for $69,050, virtually all of which was profit (GX 48).

In the meantime, Cohen and Deutsch stirred up investment interest in Richard Packing. For example, at a meeting in New York City at the offices of Status Marketing in the fall of 1968, Deutsch and Cohen told Hugh Deane, of Wood, Walker & Co., how they, through Status Marketing, were going to develop the next McDonald's, and by "acquisition, build the meat business several fold . . ." (Tr. 582). Earlier, by telephone, Deutsch and Cohen had given Deane some incredibly high and totally unrealistic earnings estimates. Earnings of $1 a share for the fiscal year ending June, 1969, were to be expected with earnings at $2.50 the following year and $5 for June, 1971 (Tr. 574-82). Richard Packing reported earnings of 5¢ per share for the fiscal year ending June 30, 1969, and only avoided a loss of 6¢ per share for the fiscal year ending June 30 1970, by selling off its meat packing facilities (Tr. 3867; GX 13A). No acquisition of any meat company was ever consummated.* Further, Richard Packing's report to shareholders for the period ended June 30, 1968, contained the following statement by Cohen: "A national agreement has been signed with Status International, a marketing and sales organization, specializing in the sale of franchise concepts. Richard Packing Company's Program was selected by 'Status' from a group of competitive concepts" (Cohen

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10% of the "float" at that time. If Jaffee & Co. had gone to the open market with a sell order for 10,000 shares of a thinly traded stock like Richard Packing, the effect on the market price unquestionably would have been disastrous.

* Deane telephoned Deutsch shortly after this meeting at Status Marketing and requested that he be "shown" whatever Richard Packing stock was available. Through the end of 1969, Deane purchased "approximately 8 to 12 thousand shares" of Richard Packing, most of it from KAB, after receiving telephone calls from Shwidock or his assistant (Tr. 587-88).

R). Status Marketing, however, was nothing more than a newly organized company promoted by Cohen which went bankrupt less than two years later; Richard Packing was then its *only* client (Tr. 2750, 4648).

Thereafter, in January, 1969, when Deane told Deutsch that some of his customers were intending to sell their Richard Packing stock because its price had dipped to the 20s Deutsch responded:

> " 'Hugh, don't worry. Big things are happening here. We are about to close on Value Line,' which is a large mutual fund and they were about to take a sizeable position in the company, 'And I want the stock at 28 to 30 and ultimately much higher, and I suggest that you buy more, and I am going to buy more behind you' " (Tr. 591).

Deane took Deutsch's advice and purchased several hundred additional shares of Richard Packing. Most of these shares were purchased from KAB after Deane received telephone calls from Shwidock, or his assistant, who were directed to him by Deutsch and Duboff (Tr. 591). Thereafter, Morginstin and Harris, in-law nominees of Deutsch and Duboff, bought several hundred shares from KAB at the very low prices of $22 and $25 per shares * (Tr. 1506, 1535, 1541-42).

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* Duboff erroneously asserts in his brief that Harris and Morginstin were selling Richard Packing stock at this low price. He argues that such *sales* establish that he was not manipulating the price of Richard Packing stock. As such, Duboff's argument that the evidence of directed trading and "kickbacks" is not evidence of a scheme to defraud is frivolous. The use of directed trading enabled Deutsch and Duboff to make these "Morginstin-Harris" trades, to show significant activity in a thinly-traded stock, to control the price of the stock and to make secret profits by "kickbacks" to a Swiss bank. Similarly, this activity set the stage for the next and more significant part of the scheme.

b. The Regulation A Offering

The reason for Deutsch's stated purpose in wanting the price of Richard Packing "at 28 to 30" soon became clear. In February, 1969, Richard Packing sold 50,000 shares of unregistered stock to Value Line for $1,400,000 or the $28 per share price maintained by the activities of Deutsch and Duboff.* A month later, Richard Packing sold 10,000 shares of its stock in an offering under Regulation A at $28 per share.

The offering circular in connection with the Regulation A offering stated in pertinent part that 10,000 shares of Richard Packing stock were being offered to the public through the solicitation of its directors, officers and employees, with the actual price dependent upon the market price of the shares at the time of sale. It was specifically stated that the offering was not to be underwritten (GX 5A). In fact, the offering was underwritten by Deutsch, Duboff, Shwidock and KAB; the "market" price of $28 per share was predetermined long before March 11, 1969, the effective date; and the shares, rather than being offered to the public, were placed in accounts over which Deutsch and Duboff exercised control or had a beneficial interest. In short, this so-called "public" offering was nothing more than a private deal to enrich the defendants and further the manipulative scheme. Richard Packing received $280,000, the proceeds of the offering; KAB made $4,050 in trading profit, 30% of which was "kicked back" to Deutsch and

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* Gerald O'Meara from Value Line was told in late 1968 or early 1969 by Deutsch that Richard Packing had already sold "a large number of units" before its advertising campaign had even begun, "of which Jaffee & Co. sold a significant portion." In addition, Deutsch told O'Meara that Richard Packing expected to have "at least 150 units operating by the end of the year" (GX 2). Jaffee & Co. did not sell franchise units for Richard Packing. Moreover, there were only four units in operation by the end of 1969 (Tr. 4650).

Duboff and $4,313.20 in commissions; and Morginstin and Harris, in-law nominees of Deutsch and Duboff, each made $6,330.90 (GX 47).

In February, 1969—prior to the effective date of the offering—Shwidock was introduced to Cohen by Deutsch and Duboff at the Hilton Hotel. Shwidock's testimony was as follows with respect to the Regulation A offering:

> "Well I was introduced to Mr. Cohen as the broker who was going to handle the Richard Packing money and that I was the guy who would send him the $280,000 that was to be the proceeds of the sale of Richard Packing stock . . . (Tr. 1039-41).

Shwidock later received a letter from Cohen dated March 5, 1969, which stated in part: "As per our conversation we expect that the registration of 10,000 shares of Richard Packing Co. should be effective around the week of March 10. I would appreciate your handling of the sale. We would not expect to get less than $28.00 per share" (Cohen F; Tr. 1042). The 10,000 shares were in fact issued at $28 per share, sold through KAB, and Richard Packing, as pre-arranged, received *exactly* $280,000 (GX's 19A-19D).*

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* The foregoing establishes Cohen's knowledge of the falsity of many of the statements in the offering circular, which he had reviewed line by line with Richard Packing's attorney, Alvin Malmon. The conversation alone establishes that Cohen knew that, contrary to the statements in the offering circular, the price of the shares offered had been fixed at $28.00 per share and was not to be determined by market conditions, and that the offering was not being sold by the efforts of Richard Packing's directors, officers and employees as he specifically told Malmon (Tr. 85). Cohen claims he acted in good faith on the advice of his attorney, but that issue was fairly put to the jury in the charge (Tr. 5318-19), and clearly rejected by them.

Appellants' argument that KAB was merely a "billing agent"

[Footnote continued on following page]

Perhaps most important to the overall scheme, the Regulation A offering was utilized to induce the Denver Funds to purchase Richard Packing stock.* In late February or early March, 1969, prior to the effective date of the Regulation A offering, Deutsch called Hurley in Denver, informed him of the Regulation A offering and gave him the opportunity to participate. Deutsch then added that the offering price "would be below" the current market price (Tr. 1840-41). Shortly after this conversation, the Denver Funds made their initial purchase of Richard Packing stock—5000 shares or one-half that available in the Regulation A offering (GX-47).

In the end, the Denver Funds were to receive 3,000 more of the 10,000 shares offered in the Regulation A sale. Of the 5,000 shares that were not immediately bought by Hurley, 3,000 were placed in blocks of 1,500 shares each in the KAB accounts of Morginstin and Harris, Deutsch and Duboff's in-law nominees, at Duboff's direction. At approximately this same time, Duboff purchased 3,000 shares of Richard Packing from Fred Mazzeo, a trader at V.F. Naddeo, and directed him to purchase the shares at KAB. The 3,000 shares from the Morginstin and Harris accounts

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that simply sent out confirmations is rebutted by the extensive profit that KAB made on the offering and the fact that 2,000 shares of the offering were purchased by the KAB trading account for subsequent distribution (GX 47).

* Hurley had earlier been softened up by significant misrepresentations by Deutsch. In early 1969, Deutsch visited Hurley in Denver and attempted to interest him in Richard Packing. Deutsch volunteered that 60 Circus Wagons would be sold and *built* by 1970. As previously indicated, only four were in operation by 1970. Further, Deutsch gave Hurley some totally unrealistic earnings estimates. Thus, he estimated that Richard Packing would report earnings of 40¢ per share in June, 1969; and at a rate of $3 by December, 1969, and $5-7 by the following year (Tr. 1829-32; GX 33).

were thereby delivered to Jaffee & Co. at $33 per share, some five points above the original purchase price contemporaneously paid by Morginstin and Harris (Tr. 3313-15). Morginstin and Harris thereby each made over $6,000 on this transaction. Obviously, Duboff could have purchased these shares *directly* from the accounts of his father-in-law and Deutsch's brother-in-law at KAB (Tr. 3316). The purpose for injecting V.F. Naddeo into this transaction was simply to create activity and artificially raise the price of the stock.

c. The Denver Funds

From March, 1969, through October 24, 1969, V.F. Naddeo purchased some 40,000 shares of Richard Packing stock for Jaffee and Co., for the account of the Denver Funds (GX 50).* Mazzeo had a relationship with Deutsch and Duboff similar to that of Shwidock at KAB. Mazzeo testified that of the hundred brokers he dealt with daily, only Duboff and Deutsch placed orders with him and at the same time directed him to make the purchases at a specific brokerage house (Tr. 3201). Mazzeo stopped doing business with Duboff in October, 1968, after refusing to "maintain" the market in Richard Packing as prescribed by Duboff (Tr. 3202-03).

On December 4, 1969, New Dimension, for the most part owned by Deutsch, Duboff and Cohen, opened for business (Tr. 3492; GX 37). From that point on, New Dimension provided Jaffee & Co. with substantially all the remaining shares of Richard Packing stock for the account of the

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* Duboff and Deutsch turned to V. F. Naddeo after KAB suffered severe capital problems in March, 1969. KAB was suspended from trading for several weeks at that time (Tr. 1425).

Denver Funds—approximately 45,000 shares.* New Di-

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* From October 24, 1969, when Mazzeo stopped trading with Duboff, until New Dimension opened for business on December 4, Jaffee & Co. purchased 3,500 shares of Richard Packing stock for the account of the Denver Funds from Alessandrini & Co., a New York brokerage house. Alessandrini, however, purchased 2,200 shares of these shares from V. F. Naddeo. Alessandrini raised the price of each share ½ point in passing it on to Jaffee & Co., for the account of the Denver Funds (GX's 50 and 86). Moreover, during this time period, Alessandrini's only customer for Richard Packing stock was Jaffee & Co. (Tr. 4207-08).

Duboff further argues that the trial court committed prejudicial error in permitting evidence of purchases of Richard Packing stock by Financial Dynamics Fund and Financial Industrial Fund. It is contended in essence that there was no testimony about the manner in which, or the reasons for which, the two fund managers of these funds purchased Richard Packing stock (Br., Point Seven, at 146-53). This argument is not supported by the record.

Duboff's argument is premised upon a misconception of the relationship among the Denver Funds. Financial Dynamics Fund and Financial Industrial Fund were both affiliated with Financial Venture Fund, which was managed by Hurley. Each was under the management of Financial Programs (Tr. 1971). Thus, the salary of each fund manager was paid by Financial Programs (Tr. 2014-15). Mr. Hirshheimer, a Vice President and member of the Board of Directors of Financial Programs, did the trading for each of these funds (Tr. 2018). The fund managers met daily to talk about their stock investments, including Richard Packing. In fact, one of the objectives of the overall program was for each fund manager to "feed and complement each other in the endeavors" in which they were engaged (Tr. 2049-50, 2063-65, 2079-80, 2086).

Furthermore, as Hurley testified on cross-examination, each of the Denver Funds was proscribed from owning more than 10% of the total number of outstanding shares of a company (Tr. 2111-13). Richard Packing had 760,525 shares outstanding, following two stock splits during the spring and summer of 1969. Consequently, Financial Venture Fund was prohibited from holding in excess of 76,052 shares of Richard Packing Company. As the Denver Funds held 156,000 shares, the reason for purchases of Richard Packing stock by Financial Industrial Fund and Financial Dynamics Fund is readily apparent.

mension's trading of Richard Packing stock took on a familiar pattern. Jack Rothman, New Dimension's cashier, testified that Duboff or Deutsch would call and "say to me, 'I'm selling them' for instance, '1000 shares of Richard Packing' at a certain price and that I should go out to a broker which they would name to me to pick up the stock at another price and, in turn, they would buy it from us at the price that they set originally." Alternatively, New Dimension was instructed by Duboff or Deutsch to "clean up the street" of all Richard Packing stock at a certain price. Duboff or Deutsch would then purchase this stock from New Dimension at a price that they set. The price so set was generally $2 to $3 a share more than New Dimension was paying for Richard Packing on that particular day (Tr. 3512-13; GX 83).

By July 31, 1970, New Dimension made approximately $115,000 in the trading of Richard Packing stock alone (Tr. 3524). The evidence further established that Duboff and Deutsch, as undisclosed principals of New Dimension, funneled off these trading profits into monthly rent payments and restoration costs for a townhouse on 38th Street in New York City. This newly renovated townhouse, equipped with swimming pool and sauna bath, was owned by Deutsch and Duboff. New Dimension, however, never occupied space on these premises (Tr. 3607-08, 3617; GX's 80, 80A-80Z, and 81).*

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* Duboff and Cohen each argues that the trial court committed prejudicial error in admitting testimony relating to their relationship with New Dimension (Duboff's Br., Point Eight at 154-56 and Cohen's Br., Point VI at 50-51). This contention is frivolous.

Deutsch correctly acknowledges that the "issue was whether defendants in fact controlled the trading by New Dimension in Packing stock" (Br. at 96). Therefore, evidence tending to establish their undisclosed ownership of New Dimension is most germane to this "issue". Consequently, as the trial judge recognized, evidence relating to the siphoning off of New Dimension's trading profits in Richard Packing by Duboff and Deutsch for

[Footnote continued on following page]

The continued ability of Deutsch, Duboff and Cohen to find a ready market for Richard Packing stock rested on the use of increasingly exaggerated misrepresentations of Richard Packing's condition and activities. An example is the "Papworth Report", which was forwarded to Hurley after being reviewed by Cohen and Deutsch (Tr. 1868-69, 2308-10). This report made reference to an alleged agreement entered into by Richard Packing to acquire F & T Meats, a company with sales of $1.2 million and earnings of $80,000 (Deutsch A). No such agreement was ever entered between Richard Packing and F & T Meats (Tr. 2349-50). Deutsch represented to Hurley in July, 1969, that 100 franchises had been sold; at approximately the same time he informed James Giasafakas, an employee of the Denver Funds, that 200 franchises had been sold (Tr. 2454).*

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the renovation of their townhouse was highly relevant (Tr. 3545-46). Evidence that New Dimension paid a decorator $6200 to furnish Duboff's home was similarly probative (Tr. 3617-21; GX's 75A, 75B and 82). Coupled with Rothman's testimony that Duboff and Deutsch directed New Dimension's trading in Richard Packing stock, it was clear that this firm was being utilized as a vehicle to manipulate the price of that stock.

Similarly, Hurley testified that Cohen was designated a 12% interest in New Dimension (Tr. 1906-07; GX 37). In early January, 1970, Richard Packing opened a customer's account at New Dimension with the deposit of a $200,000 check. This was New Dimension's largest customer account. In any event, the $200,000 was deposited into New Dimension's bank account and was ultimately returned several months later in five separate installments. During that time period, no trades were made by Richard Packing in that account (Tr. 3515-22; GX's 71A-71F). Under these circumstances, the trial judge properly admitted this evidence for the jury to decide whether this $200,000 "customer's account" was, as argued by the Government, in reality Cohen's contribution to the very firm which was then being utilized to manipulate the price of Richard Packing stock (Tr. 3477-79). Moreover, 8,000 shares of Cohen's "inside" stock that he sold off during the manipulation was purchased by New Dimension for resale by Jaffee & Co. to the Denver Funds (GX 48).

* Even Cohen refers to these assertions as "gross misrepresentations" (Br. at 22).

In late March, or early April, 1969, following the effective date of the Regulation A offering, Bass & Company, a public relations firm in New York City, was retained by Cohen on behalf of Richard Packing (Tr. 4013). Over the next year, Bass & Company sent out a series of press releases to the financial community including the Denver Funds. These extremely "bullish" releases, based on information Cohen provided, depicted Richard Packing as a strong and financially sound company.

Each successive press release listed the number of franchise contracts sold up to that date. The final release, dated April 6, 1970, for example, stated that 210 franchises had been sold as of that time (GX 31G). Similarly, by letter, dated March 17, 1970, Cohen informed O'Meara at Value Line that 200 franchises had been sold as of March 4 (GX 4). The 1969 Annual Report, however, though not released until July, 1970, contained a "message from the President to our shareholders", signed by Cohen, dated April 16, 1970, just ten days later, in which he stated the following: "To date, commitments for 82 franchises have been secured by Status Marketing" (GX 13A). This figure was also very close to that recalled by Joseph Kalley, a former vice president of McDonald's Corp., who was in charge of operations for Richard Packing's Circus Wagon chain of franchise fast-food, drive-in restaurants. On Kalley's cross-examination, *Cohen offered* a document prepared by Kalley which put the number of franchise restaurants as of April 1, 1970, at 98 (Cohen's AA; Tr. 2797-98, 2890). Kalley certified the correct figure as 99, adding an additional unit in Canada.*

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* Cohen attempts to reconcile the "discrepancies of the number of franchises sold" by attributing it to a change in accounting principles applicable to the franchise industry which became effective in the fall of 1969. He argues that the 82 figure in the Annual Report was dictated by a more conservative manner in which accountants were compelled to count franchises after the

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The evidence further established that Cohen, while pouring out "bullish" press releases, omitted to disclose to the investing public the true financial condition of Richard Packing—a company plagued with serious problems. Most of these problems were associated with rising construction and real estate costs, and Richard Packing's inability to come up with adequate financing (Tr. 2893-95, 4650-54). Dean Faris, a former vice-president of Status Marketing, and a defense witness, testified that he kept Mr. Cohen informed of such problems (Tr. 4652-53). In addition, in the early part of 1970, many franchises began cancelling their contracts and had their money returned. Perhaps most important, Status Marketing, the sales organization that was solely responsible for selling Richard Packing's franchises, went bankrupt prior to April, 1970 (Tr. 2747-50; GX 13B-1). Finally, as noted above, without the sale of its meat packing facilities, Richard Packing would have reported a loss of $51,000 or 6¢ a share for the fiscal year ended June 30, 1970 (Tr. 3867).

Cohen was able to conceal Richard Packing's rapidly deteriorating condition by withholding financial statements and particularly the 1969 Annual Report. From the early fall of 1969 on, Cohen was repeatedly asked for the annual report for the fiscal year ended June 30, 1969, or for any other current financial information on Richard Packing. Cohen always responded that the information would be forthcoming (Tr. 606-07, 2541-43). On March 19, 1970, three days after O'Meara noted how "splendidly" Richard

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new principles became effective. The 210 figure, contained in the April press release, allegedly reflected the industry practice prior to the change in accounting principles. Cohen's contention is not supported by the record. William L. Louder, Cohen's witness and an accountant at Coopers & Lybrand, testified that the change in accounting principles *did not affect the manner in which the number of units were counted but only the way income was reported* (Tr. 4813-15). Richard Brodkorb, Richard Packing's accountant, similarly testified that the change *only* affected the way franchise income was reported (Tr. 3911-16).

Packing was doing * and prior to the issuance of the April press release, Cohen wrote Bass & Company and requested them to mail the 1969 Annual Reports to Richard Packing. This letter concluded as follows:

> "I DO NOT wish this statement to be distributed to any media whatsoever. Only our stock holders are receiving this report and we will do that distributing. Please make sure these instructions are followed to the letter. Please call me if you have any further suggestions" (GX 84).**

The Denver Funds, as well as Value Line, never received Richard Packing's 1969 Annual Report. Hugh Clayton, a Richard Packing stockholder, retained the 1969 Report he received and the envelope in which it was received. The envelope was post-marked "July 21, '70" (GX 89; Tr. 4956).

By July, 1970, the Denver Funds were in the process of selling out their 156,000 shares of Richard Packing stock at $1 a share, thereby incurring a loss of approximately $5.1 million (GX's 63A-63E). Cohen, on the other hand, had sold approximately 13,000 of his own "inside" shares of Richard Packing stock as the price was being manipulated upwards—shares which cost him approximately 17¢ each. By February 20, 1970, his profit on these sales was $436,541.75 (GX 48).***

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* On March 16, 1970, O'Meara wrote his superior at Value Line that Richard Packing was doing "splendidly", and "has now sold over 200 units." He further stated that Richard Packing's "*only* problem is its accounting, which is plaguing the franchising industry" (emphasis added) (Cohen's W).

** The words "I DO NOT" appear in bold face in the original letter.

*** Cohen, without citing any legal authority, argues that it was error for the trial court to admit evidence of these sales. He contends in essence that they were irrelevant to the charges

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2. Cohen

Taken most favorably to the Government, the evidence clearly established Cohen's participation in every phase of the conspiracy charged. In the initial KAB phase, Cohen, while making $69,050 on sales of Richard Packing stock,

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in the Information and were extremely prejudicial (Br., Point V at 47-49). The evidence of these sales by Cohen and his realization of close to a half million dollars in profit during the time period of the manipulation was certainly a relevant factor to be weighed by the jury in determining his intent and motive in participating in the conspiracy.

Cohen further contends, again without citing any legal authority, that it was error to receive evidence of the sales of Richard Packing stock by the Denver Funds at $1 per share (Br., Point VII at 52-54). Cohen's argument that there was no evidence that Richard Packing was losing money, or as to "what the market for Richard Packing was in July and August 1970" is simply not supported by the record. As indicated above, Brodkorb, Richard Packing's accountant at the time, testified that *but for* the sale of its meat packing facilities Richard Packing would have reported a $51,000 loss for the fiscal year ended June 30, 1970 (Tr. 3867). Moreover, James Ledbetter, a Richard Packing stockholder, testified that the price in the "pink sheets" for Richard Packing stock in July, 1970 was around 7 or 8. However, he was unable to find a buyer for his 3225 shares at that price at that time. It doesn't take much imagination to see what type of response the Denver Funds received with their proposed sale of 156,000 shares. Further, the Information alleged that the Denver Funds lost approximately $5.1 million as a result of the defendants' manipulation of Richard Packing stock (Information, ¶ 11(f)). Yet, no pre-trial motion was made by Cohen or his co-defendants to strike this alleged prejudicial matter from the Information, or from the superseded Indictment.

As this Court stated in *United States* v. *Ravich*, 421 F.2d 1196, 1203-04 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), it is for the trial judge to weigh the probative value of evidence and his ruling will rarely be disturbed on appeal. The trial court's rulings on these matters were entirely proper as the questioned evidence was highly relevant to the charges in this case.

participated with Deutsch in encouraging Deane to buy Richard Packing. Not only did Cohen give out grossly exaggerated earnings projections, but he reported that Richard Packing's franchise program—slated to be the next McDonald's—supposedly had been "selected" by Status International, a marketing and sales organization, "from a group of competitive concepts." In March, 1969, he secured the proceeds of the Regulation A offering for Richard Packing, knowing that there were false statements in the prospectus. Thereafter, while the Denver Funds were being loaded down with Richard Packing stock, he caused Bass & Company to issue press releases which concealed the financial condition of Richard Packing, and grossly exaggerated the success of its franchising program. Similar misrepresentations were given to Value Line. He also became a part owner of New Dimension, the vehicle by which Richard Packing stock was manipulated in connection with its sale to the Denver Funds. During this entire period, Cohen succeeded in selling a large quantity of his Richard Packing stock at a profit of nearly half a million dollars.

Cohen also argues that the evidence showed multiple conspiracies. As noted, however, the evidence clearly established a single conspiracy over a nearly two-year period, which, though arguable in several phases, had a single purpose—the foisting of Richard Packing stock on an unsuspecting public at prices inflated by directed trading and material misrepresentations. Cohen participated in each and every phase; whether he knew of all the devices by which the scheme was accomplished is irrelevant so long as they were, as here, within the scope of the conspiratorial agreement charged. *United States* v. *Overton*, 470 F.2d 761, 766-67 (2d Cir. 1972), *cert. denied*, 411 U.S. 909 (1973); *United States* v. *Quinn*, 445 F.2d 940, 944 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971).

In any event, the issue of multiple conspiracies was fairly put to the jury * (Tr. 5297-99). Cohen's complaint that an "all-or-nothing" charge was given (Tr. 5298) is foreclosed by the upholding of the precise language used here in *United States* v. *Sperling*, Dkt. No. 73-2363 (2d Cir., October 10, 1974), slip op. at 5666 and *United States* v. *Bynum*, 485 F.2d 490, 497 (2d Cir. 1973), *vacated on other grounds*, — U.S. —, 42 U.S.L.W. 3646 (May 28, 1974), and by the trial judge's careful charge that each defendant's guilt should be separately considered (Tr. 5272, 5290-91). The jury's verdict was fully consistent with the information, the evidence and the charge.**

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* The trial judge was also scrupulous in protecting Cohen's rights in the admission of evidence, perhaps, we suggest, overly scrupulous. For example, Judge Ward declined to receive into evidence several checks totalling approximately $1 million received by Morginstin from his account at KAB which were offered to establish that Morginstin was merely a nominee of Deutsch. The Court recognized their probative value as to Deutsch and acknowledged that he would have admitted these checks if Deutsch were being tried alone (Tr. 3648-49). However, he perceived that any limiting instructions as to Cohen would be insufficient. After some discussion the trial judge asked, "How could I insulate Mr. Cohen from the fallout that will be the result of my admitting this million dollars worth of checks?" (Tr. 3655). On other occasions, Judge Ward gave strong limiting instructions when he admitted similar proof, although these instructions may not have been necessary (E.g., Tr. 1969).

Thus, it is clear that unlike the peripheral defendant, Shuck, in *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966), the proof of Cohen's participation in the conspiracy was hardly tenuous and insubstantial. Moreover, Judge Ward was very much aware of *Kelly*, which was referred to often during the trial, and its potential effect on Cohen. In fact, Judge Ward represented Shuck at trial in the *Kelly* case.

** On the basis of this clear showing of a single conspiracy, Cohen's claim that he was entitled to a severance is meritless. *United States* v. *Koss*, Dkt. No. 74-1878 (2d Cir., November 15, 1974), slip op. at 433; *United States* v. *Bynum*, *supra*; *United States* v. *Cassino*, 467 F.2d 610, 622 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973); *United States* v. *Vega*, 458 F.2d 1234

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3. Duboff

Duboff's claim of insufficiency is clearly frivolous. In the initial KAB phase of the scheme to manipulate, Duboff, with Deutsch, directed Shwidock in the trading of some 18,000 shares of Richard Packing stock, or approximately twenty percent of the "float", in just a seven month period. Thirty percent of the trading profit KAB derived from this directed trading, or approximately $15,000, was "kicked back" to Duboff and Deutsch. At Duboff's direction, these kickback payments were sent directly by Shwidock to the Reiss Bank, Zurich, Switzerland. While Duboff was unloading 10,000 shares of Richard Packing stock from Jaffee & Co., or 10% of the "float", in October 1968, through KAB, he was simultaneously directing the sale of this company's stock to investors, such as Hugh Deane, who were relying on the gross misrepresentations of Cohen and Deutsch in making these purchases.

Duboff directed Shwidock in the distribution of each of the 10,000 shares of the Regulation A "public" offering: 5,000 of these shares were funnelled *directly* to the Denver Funds; 3,000 were first placed in the accounts of Morginstin and Harris, in-law nominees of Duboff and Deutsch, and were then resold to V. F. Naddeo for Jaffee & Co. a few days later, at Duboff's direction, for a substantial profit. This "needless" injection of V. F. Naddeo into the transaction not only served to create activity but raised the price of these shares to the Denver Funds. In October, 1969, Duboff criticized Mazzeo for not "maintaining the market" in Richard Packing that Duboff wanted. Thereafter, Mazzeo refused to do further business with Duboff.

(2d Cir. 1972), *cert. denied sub nom. Guridi* v. *United States*, 410 U.S. 982 (1973); *United States* v. *Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972); *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States* v. *Borelli*, 336 F.2d 376, 387 (2d Cir. 1964), *cert. denied sub nom. Mogavero* v. *United States*, 379 U.S. 960 (1965); *United States* v. *Aviles*, 274 F.2d 179 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960).

Duboff overcame this problem in December, 1969, with the opening of New Dimension. From that point on, he was able to maintain whatever market he wanted in executing the large discretionary orders in Richard Packing stock for the Denver Funds. In this manner, he directed New Dimension to sell Richard Packing stock to himself at Jaffee & Co., for the account of the Denver Funds at prices generally $2 to $3 a share higher than New Dimension was paying at the time. Thus, while the stock market was collapsing, Richard Packing stock continued to rise in price and New Dimension made approximately $115,000 profit in these sales to the Denver Funds. Duboff, with Deutsch, siphoned off these profits into payments for their townhouse and furniture for Duboff's home.

4. Deutsch

Deutsch's only claim of insufficiency of the evidence relates to Count Four of the Information (Br. at 132-36). He seeks to argue from *United States* v. *Maze*, 414 U.S. 395 (1974), and the Supreme Court's supposed grant of certiorari in a recent case, that the proof of mailing confirmation slips and offering circulars was insufficient to sustain Count Four of the Information.

Deutsch takes the position that this Court's decision in *United States* v. *Marando*, Dkt. No. 73-2378, *supra*,* controls the issue posed. We agree. Deutsch goes on to claim, however, that the Supreme Court has granted a writ of certiorari sought by one of the appellants in *Marando* to consider the precise question here posed, in *Berardelli* v. *United States*, Dkt. No. 74-5059, filed August 2, 1974. In fact, the Supreme Court has *denied* the certiorari petition taken from *Marando* in *Berardelli* v. *United States*, Dkt. No. 74-5059, 43 U.S.L.W. 3280 (Nov. 11, 1974).

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* The thrust of *Marando* is that transmission of confirmation slips and offering circulars through the mails, under circumstances here posed, clearly suffices to support charges of violations of the Securities Act of 1933 and of the Mail Fraud Statute.

Deutsch argues that the false offering circulars mailed to Harris and Morginstin cannot support a conviction based on Count Four (Tr. 133). However, Title 17, Code of Federal Regulations Section 230.256 requires that an offering circular be sent prior to or concurrent with the offer and sale of securities to *any person*. Since a failure to transmit the offering circular to any person would clearly trigger a violation, transmission of the offering circular was clearly necessary as a matter of law, regardless of the use to which the offering circular was put by its recipient. Moreover, the Government's proof at trial showed that the false offering circular had been sent out not only to Messrs. Harris and Morginstin but also to the Denver Funds (Tr. 2460-62, 2491, 2494).

POINT II

Appellants were properly convicted under each count of the Information.

Duboff claims that his conviction under Counts One, Two and Three of the Information was improper because: (1) these counts were legally insufficient, and (2) assuming the sufficiency of the Information, the Government's Bills of Particulars were insufficient. Moreover, each appellant contends that there was an improper variance between the charges allegedly proved and submitted to the jury, and those contained in the Information. None of these claims has merit, and no motion to dismiss on the grounds now asserted was made prior to trial. Duboff's claims regarding the sufficiency of the Information and the Bill of Particulars are fully disposed of by the Court's recent opinion, rejecting identical claims in a highly similar context, *United States* v. *Koss*, *supra*, slip. op. at 450. It is clear from earlier authority as well, that his contentions are without merit.

1. Indictment

The general test for the sufficiency of an indictment is whether it contains the essential elements of the offense charged, adequately apprises a defendant of what he must be prepared to meet, and is sufficiently detailed to assure against double jeopardy. *Russell* v. *United States*, 369 U.S. 749 (1962); *Wong Tai* v. *United States*, 273 U.S. 77 (1927); *United States* v. *Palmiotti*, 254 F.2d 491 (2d Cir. 1958). Under this test, this Circuit, as shown by its recent decision in *United States* v. *Sperling*, Dkt. No. 73-2363 (2d Cir., October 10, 1974), slip. op. at 5637, has consistently "sustained indictments which track the language of a statute, and in addition, do little more than state time and place in approximate terms." *United States* v. *Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *United States* v. *Weiss*, 491 F.2d 460 (2d Cir. 1974); *United States* v. *Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969); *United States* v. *Varlack*, 225 F.2d 665, 669-70 (2d Cir. 1955).

Count One of Information 74 Cr. 447 charges the defendants and their co-conspirators with a conspiracy to violate certain specified provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, the rules and regulations promulgated thereunder and the mail fraud statute. In so doing, it not only tracks the applicable statutory language with approximate dates and times provided, but spells out in considerable detail the nature of the manipulative scheme charged and the "means by which the defendants and their co-conspirators would and did carry out said conspiracy. . . ."

Count One then goes on to delineate the "means" by which the defendants successfully carried out the charged fraudulent manipulative scheme. First, it clearly specifies that Deutsch and Duboff, during the period of the conspi-

racy charged, "caused accounts over which they exercised control or in which they had a beneficial interest to purchase and sell said stock so as to (1) restrict the available supply to the investing public, and (2) create the appearance of market activity and demand in said stock" (Information ¶ 11(a)). The remaining sub-paragraphs then chronologically specify the manner in which the defendants achieved the necessary control over the trading of Richard Packing stock. First, starting in October, 1968, in exchange for 30% kickbacks which were funnelled to the Reiss Bank, Zurich, Switzerland, Deutsch and Duboff were able to direct the trading in Richard Packing stock by KAB (Information ¶¶ 11(b) and (c)). Thereafter, in March, 1969, in conjunction with the filing of a false and misleading offering circular with the Securities and Exchange Commission, the defendants caused KAB to distribute 10,000 newly issued shares at pre-arranged prices to accounts over which Deutsch and Duboff exercised control or in which they had a beneficial interest, rather than to the public (Information ¶¶ 11(d) and (g). The Information then specifically details that from March, 1969, this restriction of market supply and creation of demand was effected by *inducing* the Denver Funds to purchase Richard Packing stock. It further alleges that as a result of this manipulative activity the price of Richard Packing common stock rose from approximately $25 per share to approximately $53 per share and ultimately resulted in a loss to the Denver Funds of approximately $5.1 million (Information ¶¶ 11(e) and (f)).

The Information therefore, clearly and concisely charges and describes in considerable detail a conspiracy by the defendants and their co-conspirators to artificially inflate and maintain the market price of Richard Packing stock by means of manipulative activities and a scheme to defraud. Duboff, however, argues that the conspiracy count,

as well as Counts Two and Three, were insufficient because they failed to inform him "of all of the facts and circumstances constituting the specific offense with which he was charged . . ." (Br. at 44). For example, he argues that paragraph 11(a) was insufficient because it failed to identify the accounts referred to or to indicate when and where the alleged purchases or sales of stock occurred.

Such specificity is clearly not essential, however, to fulfill the basic function of pleading a conspiracy count in an indictment. Duboff disregards the well-settled rule that in an indictment which charges a conspiracy to commit an offense, it is not necessary to allege with technical precision all the elements essential to the commission of the underlying offense. In charging such a conspiracy, it is sufficient to identify the defendants' common intent and the offense which they conspired to commit. *Wong Tai* v. *United States, supra,* 273 U.S. at 81; *Thornton* v. *United States,* 271 U.S. 414 (1926); *Williamson* v. *United States,* 207 U.S. 425, 447 (1908); *United States* v. *Kenney,* 462 F.2d 1205 (3d Cir. 1972); *United States* v. *Addonizio,* 451 F.2d 49 (3d Cir. 1971), *cert. denied,* 405 U.S. 936 (1972); *United States* v. *Knox Coal Company,* 347 F.2d 33, 38 (3d Cir. 1965). In *United States* v. *Thornton, supra,* 271 U.S. at 423, the Court stated:

> "The rules of criminal pleading do not require the same degree of detail in an indictment for conspiracy in stating the object of the conspiracy as if it were one charging the substantive offense."

The present Information furnished defendants with considerable detail as to the facts and circumstances constituting the specific offense with which they were charged. In so doing, the degree of specificity furnished in the Information not only went far beyond the minimal requirements of pleading a conspiracy charge, but, moreover, fully apprised

the defendants of the elements of the offense charged in Counts Two and Three so that they could adequately prepare their defense and avoid any possibility of double jeopardy. *United States* v. *Kos*, *supra; United States* v. *Sala.ar, supra.**

In support of his position that the Government's failure to include such detail in the conspiracy count rendered it and Counts Two and Three defective, Duboff relies on an array of readily distinguishable cases. In several, substantive counts were dismissed because of a failure to allege "the essential elements of the crime charged." Rule 7(c), Fed. R. Crim. P., 18 U.S.C. For example, in *United States* v. *Carll*, 105 U.S. 611 (1881), an indictment alleging in the words of the statute that the defendant feloniously and with intent to defraud did pass, utter and publish a falsely made, forged and counterfeited an obligation of the United States, but not further alleging that the defendant knew it to be false, forged and counterfeited, was insufficient. The knowledge of the defendant was an element of the crime. The indictment, therefore, set forth in the statutory language, was insufficient because it omitted an element of the crime.**

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* Counts Two and Three charge substantive violations of Title 15, United States Code, Section 77q. These counts track the language of that statutory provision, incorporate paragraph 11 of Count One of the Information, and set forth the time when the mails were used and the matter mailed.

** Other cases relied on by appellants wherein indictments were dismissed on similar grounds are: *United States* v. *Simmons*, 96 U.S. 360 (1877); *United States* v. *Thomas*, 444 F.2d 919 (D.C. Cir. 1971); *United States* v. *Harris*, 217 F. Supp. 86 (D. Ga. 1962); *United States* v. *Borland*, 309 F. Supp. 280 (D. 1970).

Especially noteworthy, of course, is the fact that Duboff, after his lengthy discourse to the effect that the Information furnished insufficient detail, goes on to make the extraordinary contention that paragraph 11—the "means" paragraph—must be disregarded in resolving this issue. Duboff is thereby asking this Court to ignore the very detail which he so strongly urges is lacking. In support of this frivolous argument he mistakenly relies on *Pettibone* v. *United States*, 148 U.S. 197, 202 (1892). The Supreme Court in *Pettibone* stated the now well recognized principle that essential elements of a crime must be clearly set forth in an indictment, and that if omitted, such allegations must be made directly "and not inferentially or by way of recital." The Court did not hold, as suggested by Duboff, that by placing direct allegations in an information under the heading "Means of the Conspiracy", that they thereby become indirect and inferential. Moreover, in *United States* v. *De Sapio*, 299 F. Supp. 436, 446 (S.D.N.Y. 1969), a case relied on by Duboff, Judge Metzner analyzed the conspiracy count of that indictment, and specifically considered and took into account the "means" paragraphs in order to determine whether the objects of the conspiracy were adequately alleged.*

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* In *De Sapio*, Judge Metzner held that two of the conspiratorial objects were sufficiently stated but rejected the mail fraud object on the grounds that there was no allegation as to who was to be defrauded or any indication given to the nature of the scheme. In upholding one of the conspiracy counts, the Court held that "the means to carry out this unlawful purpose are set forth with sufficient particularity to meet the requirement that the court be able to ascertain that the conspiracy was in fact illegal." 299 F. Supp. at 445.

2. Bills of Particulars

On January 14, 1974, Assistant United States Attorney John M. Walker, Jr., in charge of the case at that time for the Government, conferred with defense counsel for the purpose of informally resolving all discovery issues. The following day, January 15, Mr. Walker memorialized the discovery items and particulars to which the Government consented, by letter to Judge Ward, copy to all counsel. Cohen, by letter dated January 23, 1974, asked for additional specified discovery and particulars beyond that consented to by Mr. Walker. Driesman, who was later severed prior to trial, also filed extensive pre-trial motions. Neither Duboff nor Deutsch filed a single pre-trial motion.

As indicated by Duboff, a pre-trial conference was held on February 28, 1974, before the Honorable Robert J. Ward. The purpose was to set a trial date and to resolve the pending motions for discovery and particulars. No court reporter was present. Neither was Mr. Morton Robson, trial and appellate counsel for Duboff. Instead, Duboff was represented by Mark Segal, an associate of Mr. Robson, who did not appear in this case thereafter. Moreover, no individual requests for particulars of any type were made by Duboff's counsel, although at the very end of the conference he may have orally joined in those made by Cohen and Driesman.*

A Bill of Particulars, dated March 27, 1974, and an Amended Bill of Particulars, dated April 12, 1974, were thereafter filed in accordance with the Court's direction in response to Cohen's requests. These bills not only contained the information requested by Cohen in his letter of

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* If requested, an affidavit from others present will be submitted as to what transpired at this conference. Suffice it to say that it is most curious that experienced counsel, having failed to file any pre-trial motions in a complex stock fraud case, would then make oral requests for particulars, in a case where they were allegedly so necessary, without the benefit of a court reporter's presence.

January 23, 1974, as directed by the Court, but included specification of the approximate times and places relevant to each overt act, as well as all known co-conspirators not named in the then pending Indictment.

It is noteworthy that Duboff, who now argues that "the need for particularization was greater in this case than in the average case because of the incredible lack of specificity in the Indictment", chose not to take advantage of Rule 7(f) of the Federal Rules and formally move for a bill of particulars to clarify its alleged ambiguity. Moreover, if the Indictment really was as deficient as alleged, it is even more curious that appellants failed to move to dismiss it prior to trial. In any event, even assuming that Duboff orally joined in the motions for particulars made by Cohen and Driesman, the judge was well within his discretion in denying their motions to the extent he did, in light of the extensive detail provided in the "means" paragraph and the broad discovery and number of particulars agreed to by the Government. Duboff, in fact, concedes that "the law is clear that particulars are not to be used as a method by which the Government's evidence will be revealed to a defendant" (Br. at 74). In short, the bills of particulars ordered by the trial judge and served by the Government provided the defendants with more information that they were legally entitled to have. *United States* v. *Kahaner*, 203 F. Supp. 78 (S.D.N.Y. 1961), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). Among other cases so holding are *United States* v. *Simon*, 30 F.R.D. 53 (S.D. N.Y. 1962); *United States* v. *Bentvena*, 193 F. Supp. 485 (S.D.N.Y. 1960), *aff'd*, 319 F.2d 916 (2d Cir.), *cert. denied sub nom. Mirra* v. *United States*, 375 U.S. 940 (1963); *United States* v. *Lieberman*, 15 F.R.D. 278 (S.D.N.Y. 1953).

3. Variance

a. Deutsch and Duboff

Deutsch and Duboff argue that the Government's evidence of "misrepresentations, fraudulent acts and manipulative practices" was improperly received on Counts One, Two and Three as proof of crimes not charged in the Information * (Duboff Br. at 79). While Deutsch and

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* Duboff further contends that insufficient evidence was presented to the Grand Jury to support the charges in Indictment 73 Cr. 1085 (Br. at 87-94). This argument simply overlooks the fact that this Indictment was superseded on April 23, 1974, at the request of the trial court and with the consent of all parties, by Information 74 Cr. 447, upon which this case was tried. This superseding Information consolidated the fifteen substantive counts in Indictment 73 Cr. 1085 into three substantive counts, for the purpose of reducing the complexity of the case for the jury. It goes without saying, of course, that each defendant benefitted from the filing of the Information by decreasing his maximum exposure to imprisonment by sixty years. *Each defendant waived indictment*, entered a plea of not guilty on this superseding Information, and the trial commenced the following day. Defense counsel failed to reserve any objections to the Grand Jury proceedings underlying the superseded Indictment, which was nolled on July 5, 1974. (April 22, 1974, Pre-Trial Conference transcript pages 1-18A; April 23, 1974 pre-trial conference transcript pages 1-13).

Duboff argues that "it was the understanding of all parties that despite the use of an Information, the case would proceed in all respects and for all intents and purposes as if the defendants were being prosecuted on the original indictment" (Br. at 3). However, neither prior to, nor at the time that each defendant entered his plea of not guilty to the Information, was this alleged "understanding" expressed on the record by any party.

In any event, it is clear solely from the excerpts of Grand Jury testimony alluded to by Duboff, that the essential elements of the crimes charged were presented to and deliberated upon by the Grand Jury. In fact, the trial judge, at the request of defense counsel, reviewed *in camera* the evidence presented to the Grand Jury and concluded that a *prima facie* case was presented. (Order of Robert J. Ward, U.S.D.J., dated June 24, 1974).

Duboff cleverly couch this argument in terms of variance from the crimes charged, it is readily apparent that they are really attacking the Information because it did not specify specific affirmative acts which underlay the false representations and other aspects of the fraudulent scheme charged. See *United States* v. *Weiss, supra,* 491 F.2d at 466. As discussed previously such evidentiary detail need not be furnished.

In making this argument, Deutsch and Duboff disregard the allegations in paragraphs 8-10 of Count One of the Information, and Counts Two and Three, wherein they are specifically charged with "employing schemes to defraud", "using and employing manipulative devices and contrivances", "making untrue statements of material facts", and "making false and fraudulent pretenses, representations and promises for the purpose of executing such scheme and artifice." Moreover, as Deutsch and Duboff readily concede, paragraph 11(e) of Count One of the Information, which is incorporated by reference in Counts Two and Three alleges that the manipulative scheme charged was accomplished in part by the inducement of the Denver Funds to purchase Richard Packing stock from accounts over which Deutsch and Duboff exercised control or in which they had a beneficial interest (Deutsch Br. at 93; Duboff's Br. at 47). Clearly, the misrepresentations about Richard Packing made by defendants—and other facts tending to show falsity—did not constitute proof of other uncharged crimes, but were highly relevant to, and were encompassed squarely within, the very allegations contained in the Information.

Reliance by Deutsch and Duboff on *United States* v. *Pope,* 189 F. Supp. 12 (S.D.N.Y. 1960), in support of their contention that the evidence constituted a variance from the charges in the Information is misplaced. In *Pope,* the defendants were indicted for substantive violations of the Securities Act of 1933, and the Securities and

Exchange Act of 1934, based on misstatements of material facts in documents filed under the acts, and for conspiracy to commit violations of the Act. In several *substantive* counts, it was alleged that the defendants made false and misleading statements with respect to material facts in that "among other things", certain specified transactions occurred. Judge Weinfeld, on motion of defense counsel, ordered this phrase stricken as surplusage. The Information in the instant case similarly contained the phrase "among other things" preceding the specifications of the false and misleading statements contained in the offering circular filed in connection with the Regulation A offering. Deutsch and Duboff conspicuously fail to note, however, that their same motion to strike this phrase as surplusage was *granted* by Judge Ward (Tr. 3141). As a result, the trial judge *did not* permit the Government to introduce evidence of false and misleading statements in connection with the offering circular above and beyond those specified in the Information (Tr. 3131-41).*

Furthermore, Judge Weinfeld in a subsequent case, *United States* v. *Mayo*, 230 F. Supp. 85 (1964), held that the words "among others" included in a "means paragraph" need not be stricken under the *Pope* rationale because it "goes to the matter of proof to sustain the charges." The court continued that "accordingly they are to be equated to allegations of overt acts in a conspiracy charge where *the government is not required to set forth all the acts relied upon to effectuate the conspiracy.*" ** 230 F. Supp. at 86 (emphasis added).

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* Moreover, in *Pope*, Judge Weinfeld, relying on the distinction between the specificity required to be pleaded in conspiracy versus substantive counts, rejected defense motions addressed to the insufficiency of the conspiracy counts in the indictment. 189 F. Supp. at 19.

** Other cases similarly relied on by Deutsch and Duboff simply do not support their position. For example, in *Stirone*

[Footnote continued on following page]

Deutsch, having failed to file any pre-trial motions for discovery or for a bill of particulars, further argues that the alleged variance caused "defendants constant surprise during the course of the trial and obvious difficulty in preparing a defense" (Br. at 97). Duboff makes a similar claim. They both fail to point out, however, that two weeks prior to trial, copies of each exhibit that the government intended to offer at trial were so designated and furnished to each defendant. In fact, Cohen, rather than participate in general discovery, chose instead to be furnished *solely* with the proposed exhibits. Included, of course, were the offering circular, press releases and the Papworth Report containing the primary misrepresentations relied on by the Government at trial * (Tr. 139, 624-25).

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v. *United States*, 361 U.S. 212 (1960), the defendant was charged with interfering with the importation into Pennsylvania of sand to be used in the manufacture of ready mixed concrete, preparatory to constructing a steel plant there. At trial, the prosecution was improperly permitted to show interference also with the exportation of steel from Pennsylvania, and the jury was instructed that it could base guilt on either premise. In this case, all the proof at trial focused upon the manipulation of Richard Packing stock, and the manner in which appellants succeeded in causing the price of that stock to rise. Thus, the jury's finding of guilt could only be based upon the manipulation charged in the Information. Similarly, the Court's holding in *United States* v. *Silverman*, 430 F.2d 106 (1970), *cert. denied*, 402 U.S. 953 (1971), that an essential element of a substantive offense could be logically inferred although not specifically pleaded in an indictment does not advance appellants' position.

* Deutsch argues that "it simply boggles the mind to expect that defendants would prepare to defend themselves against a misleading press release, for example, because that press release was one of the thousands of documents stuffed into three file cabinets. . . ." In fact, there were more like ten cabinets of documents relating to this case, to which defense counsel had virtually unlimited access. Marvin Segal, trial and apellate counsel for Deutsch, never appeared for this purpose. Instead, Deutsch himself spent considerable time reviewing and Xeroxing documents. As with Cohen, a separate group of documents were segregated from these general files, designated proposed trial exhibits, and given to Deutsch and Duboff.

Moreover, counsel for Duboff in his opening remarks to the jury revealed his acute awareness that the issues in this case would most certainly involve misrepresentations about Richard Packing:

> "When you buy stock in a business, the man who owns that business can sell you stock honestly mistaken as to the value of his business or on the basis of fraud. And this is where it is going to be at, to a large extent, in this case. We are talking about stock, an ownership in a company called Richard's Packing (Tr. 60).
>
> * * * * *
>
> "What is material is did they lie to anybody, misrepresent to anybody about the stock of Richard's and get somebody to buy stock so that these people would be defrauded? I tell you that the evidence will not establish that, not at all" (Tr. 64).

Finally, the "Papworth Report", which appellants claim to contain misrepresentations outside the charges in this case, *was introduced by Deutsch* without objection of his co-defendants on the second day of trial (Deutsch A; Tr. 786-87).* Deutsch now claims that "at this time, obviously,

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* Deutsch similarly claims that the Government was improperly permitted to call Gerald O'Meara to testify to false representations given to him in connection with Value Line's purchase of 50,000 unregistered shares of Richard Packing stock. Moreover, he asserts that this purchase was never used as a "selling tool" (Br. at 95). Again, Deutsch simply overlooks several important factors in connection with O'Meara's testimony. First, evidence of Value Line's purchase was initially introduced by Cohen during his cross-examination of Malmon (Tr. 228-34). Malmon, in fact, in response to a question by Cohen, acknowledged that this purchase was "a big thing for Richard Packing Company" (Tr. 234). Second, evidence of misrepresentations made to O'Meara relative to the number of Richard Packing franchise contracts was "admitted solely for showing background within which the conspiracy occurred" and

[Footnote continued on following page]

defendants had no inkling that they would be charged with misrepresentations containing financial projections" so that it was introduced "solely to show that the report embodied what Deutsch told Deane concerning the company's earnings" (Br. at 69). Deutsch again overlooks the fact that "at this time" he *was* very much aware that the government had intended to offer evidence of his misrepresentations concerning financial projections. He was so apprised by the Government in its opening (Tr. 25-26). Moreover, the record makes it abundantly clear that Deutsch introduced this exhibit as evidence of an independent research report prepared by Loomis Sayles, a "well-known", "respectable" and "sizeable" investment counseling firm in Los Angeles whose earnings projections, as contained in the report, were precisely the same as those given by Deutsch (Tr. 777-80). The reason for this soon became readily apparent. Michael Papworth was called as a government witness and testified that as a 26-year-old trainee at Loomis Sayles he prepared the report in his spare time for "practice" and that the information therein came from Deutsch and/or Cohen. Moreover, Papworth did not intend this report to be distributed (Tr. 2306-15).

b. Cohen

While Deutsch readily concedes that the Information charges the defendants with inducing the Denver Funds to purchase Richard Packing stock to manipulate the price of the stock, Cohen attempts to place this case within the penumbra of this Court's recent decision in *United States* v. *Zeehandelaar*, 498 F.2d 352 (2d Cir. 1974), by arguing that the "charging parts of the basic count, Count 1, *cen-*

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was "not to be considered . . . in determining guilt or innocence . . ." (Tr. 5321). Third, the 50,000 share purchase by Value Line *was* very definitely used as a "selling tool". In fact, this private placement was the subject of one entire press release, dated May 15, 1969, which was of course sent to the Denver Funds (GX 31B). Value Line was described therein as a "prominent institution" and the proceeds—$1.4 million—were to be used in part for Richard Packing's franchise operations.

tered on the March 11, 1969, offering circular" (emphasis added) (Br. at 29). Accordingly, he contends that by admitting evidence of the false representations utilized to induce the Denver Funds to purchase Richard Packing stock and charging the jury with respect to such evidence, the trial court misconceived the charges in the Information, thereby confusing and misleading the jury.*

Cohen's tortured reading of the Information requires this Court to disregard charging paragraphs 8-10 of Count One in which Cohen and his co-conspirators *are* specifically charged with devising a fraudulent scheme involving misrepresentations and other devises "to defraud purchasers of Richard Packing common stock" by artificially raising its price. Moreover, Cohen fails to point out that while he did object to certain evidence relating to the number of fast food franchise contracts, he specifically stated that he had no objection to the Government "attempting to prove the number of franchises sold" (Tr. 2692). In fact, in his opening remarks to the jury, counsel for Cohen clearly indicated that he was aware that the charges and issues in this case included misrepresentations about Richard Packing:

> "And I submit to you that the proof will show that there isn't any representation that Milton Cohen

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* In *Zeehandelaar*, the trial judge initially interpreted the indictment as charging that the defendant misrepresented to the Bureau of Sport Fisheries and Wildlife that a bona fide contract was in existence on January 17, 1972. The defendant prepared his defense accordingly. At trial, however, the court endorsed the Government's position that the Indictment should be read as charging Zeehandelaar with not having had a contract "as described in [the] application" of June 8, 1972, even though he may have had a contract of some sort on that date. This confusion clearly carried over to the jury as evidenced by several ambiguous notes received. In the instant case, the trial court had no trouble in construing the charges clearly laid out in the Information, and accordingly no confusion carried over to the jury.

ever made with respect to Richard Packing Company or its prospects that was false in any way, shape or form" (Tr. 43).

Accordingly, Cohen was not only cognizant that misrepresentations were charged in the Information, but put in an extensive defense on this issue.

POINT III

The defendants received a fair trial.

Deutsch maintains that he was denied a fair trial by the conduct and certain rulings of the trial judge. More specifically, he argues that the Court committed reversible error by making prejudicial statements including disparaging remarks to defense counsel in open court and by intruding into the proceedings to "assist in presenting the witness' testimony in a light most favorable to the Government." Deutsch further contends that he was denied a fair trial by the Court's misapplication of the doctrine of "opening the door". These arguments are totally without merit.

1. Conduct of the Trial Judge

In assessing the role of the trial court in a criminal matter, it is important to recognize that a judge is "more than a moderator or umpire." *United States* v. *Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960). Rather, he must insure that the facts are presented to the jury in a "clear and straightforward manner" while maintaining an appearance of "impartiality and judicious detachment" at all times. *United States* v. *Nazzaro*, 472 F.2d 302, 313 (2d Cir. 1973). Consequently, it is clear that a trial judge "should take an active part when necessary to clarify testimony and assist the jury in understanding the evidence." *United States* v. *Tyminski*, 418

F.2d 1060, 1062 (2d Cir. 1969), *cert. denied,* 397 U.S. 1075 (1970); *United States* v. *Cruz,* 455 F.2d 184 (2d Cir.), *cert. denied,* 406 U.S. 918 (1972); *United States* v. *Switzer,* 252 F.2d 139, 144 (2d Cir.), *cert. denied,* 357 U.S. 922 (1958).

Where an appellant's brief raises a substantial issue as to the Court's fairness in conducting a trial, this Court has found it essential to review the entire transcript in order to ascertain the "true or complete picture of the framework for and background of the allegedly prejudicial comments. . . ." *United States* v. *Weiss, supra,* 491 F.2d at 468. However, the few selected quotations lifted by Deutsch from a trial transcript in excess of 5000 pages, as well as the additional references to the record, not only fail to raise any issue as to the trial judge's fairness in conducting the trial but demonstrate how erroneous and grossly exaggerated his arguments are.

a. Comments by the Trial Court

Deutsch claims that defense counsel were the unwarranted victims of various "disparaging remarks" (Br. at 124-26). These so-called "disparaging remarks", however, were virtually all admonitions by the trial judge to defense counsel, following irrelevant and unnecessary cross-examination, to move on to areas of more probative value * (Tr. 791, 1302, 1330, 2048, 2057, as referred to in Deutsch's Br.). *United States* v. *Cruz, supra,* 455 F.2d at 185; *United States* v. *Glaziou,* 402 F.2d 8, 17 (2d Cir. 1968), *cert. denied,* 393 U.S. 1121 (1969).

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* Others consisted of attempts by the trial judge to *assist* defense counsel to clarify a testimony of a Government witness or to enable them to gain access to records in the Government's possession (Tr. 2033, 3330, as referred to in Deutsch's Br. at 126). Another was clearly precipitated by an unwarranted statement by counsel for Deutsch (Tr. 2316, as referred to in Deutsch's Br. at 125-26).

A brief review of a few excerpts lifted out of context from the trial transcript by Deutsch will serve to illustrate how Deutsch has distorted the record in this connection. For example, in quoting an excerpt from page 1619 of the trial transcript, Deutsch conspicuously fails to include the full dialogue wherein the trial judge goes on to *agree* with him and overrule the government's objection to the very matter in issue (Br. at 124-25):

> "Mr. Feffer: Objection, Your Honor. Mr. Walker is available.
>
> The Court: He is.
>
> Mr. Segal: This witness is available for that conversation, Your Honor.
>
> The Court: Oh, really?
>
> Q. Were you present during that time? A. Yes, sir, I was.
>
> Q. I am asking you whether or not during the time that you were present with Mr. Walker and members of the Internal Revenue Service, Mr. Walker represented or stated to them that he would want them to consider not prosecuting you criminally?
>
> Mr. Feffer: Same objection, Your Honor.
>
> The Court: *Overruled*" (emphasis added) (Tr. 1619-20).

Deutsch also makes reference to a colloquy on page 1530 of the trial transcript as supposedly indicative of the trial judge's bias. On this occasion counsel for Duboff objected to the introduction of an exhibit by the Government on redirect examination which *he* had previously marked for identification and utilized on cross:

> "Mr. Robson: I object on the ground of relevance.
>
> The Court: You raised it? You showed this to the witness and inquired on this?
>
> Mr. Robson: Yes, sir.

The Court: You wish to make an objection on the ground that it is irrelevant?

Mr. Robson: Yes, sir, because I believed when the witness was questioned about this matter, in the first place, and in order to preserve the record, I am continuing the objection.

Mr. Segal: Same objection, your Honor.

The Court: Overruled."

Deutsch fails to explain how these comments and ruling by the Court can possibly be interrupted as "disparaging".

b. The Questions Addressed by the Trial Court to Witnesses

Other excerpts or references to the trial transcript by Deutsch are allegedly illustrative of the trial judge questioning witnesses "to assist in presenting the witness' testimony in a light most favorable to the Government" (Br. at 127-31). Most of these, which Deutsch characterizes as improper interjections, were simply attempts on the Court's part to clarify or simplify testimony for the jury which, as in any securities fraud case, was often technical in nature * (Tr. 838-39, 1269, 1320, 1326, 1480-81, 1491-94, 1650, 1680-81, as referred to in Deutsch's Br.).

Again, an examination of just a few of the excerpts relied on by Deutsch will serve to illustrate how his claim is simply unsupported by the record. Deutsch, in quoting an excerpt from pages 1689-90 of the trial transcript, again fails to set forth the complete colloquy wherein the trial

*Deutsch fails to point to numerous instances in which the trial judge questioned government witnesses on cross-examination in an effort to assist defense counsel in eliciting responsive answers or in clarifying testimony. A review of Hurley's cross-examination by Deutsch is illustrative (Tr. 1970-2164; see specifically Tr. 2015-16, 2019, 2027, 2034, 2036, 2043, 2053, 2055-56, 2101-03, 2118).

judge goes on to sustain defense counsel's objection to the *Court's* question and directs the jury to disregard it and the accompanying answer:

> "The Court: If he took one share or a thousand, would there be a difference?
>
> The Witness: If it is all part and parcel of the public offering, he is a conduit in the distribution of the securities.
>
> Mr. Robson: If your Honor please, you know I have strong enough objections to this testimony generally, but I think that if the witness is asked a question based on specific facts, the witness' answer must be limited to those facts and she should not be allowed to add more facts, because at that point I have no idea what her opinion is based on for purposes of cross-examining her.
>
> The Court: All right. I think that is a valid objection.
>
> I will direct that the last question asked by the Court and the answer of the witness be stricken and disregarded by the jury, in view of the objection of counsel.
>
> You may inquire further, Mr. Schatten" (Tr. 1690-91).

This quoted reference from the trial transcript, which Deutsch overlooks, is illustrative of the trial judge's efforts to safeguard the rights of all parties during the trial.

Reference is also made by Deutsch to page 1263 of the transcript as a further example of the trial judge's alleged efforts to assist the Government:

> "Q. Mr. Shwidock, had you done the things which were alleged in that indictment?
>
> Mr. Feffer: Objection, your Honor, I think he's already answered he entered a plea of guilty and fully responded to the question.

Mr. Segal: I'm responding to that plea of guilty.

The Court: Overruled. Let me start with this: Were there a number of things charged in that indictment?

The Witness: Yes sir.

The Court: Were there a number of charges contained in this conspiracy count?

The Witness: Yes, sir.

The Court: Had you done any of the things which were charged in the conspiracy count?

The Witness: Yes, sir."

Deutsch's claimed prejudice from this line of questioning by the trial judge of an important Government witness, as to his prior criminal activity, strains credulity.

2. The Trial Court's Application of the "Opening The Door" Doctrine

Deutsch extracts from the trial transcript several rulings by the trial court which allegedly reflect "repeated misapplications of the doctrine of opening the door." Again, a careful reading of those portions of the trial transcript referred to by Deutsch demonstrates that he has inaccurately characterized the record in making this argument.

Deutsch first refers to his cross-examination of Shwidock relative to his guilty plea to an indictment in May, 1973, charging him with criminal activity in connection with a public offering of Status Marketing securities. It is then argued that the Government was permitted to question Shwidock and introduce evidence relating to the Status Marketing offering although the indictment to which Shwidock entered a plea "mentioned nothing about an underwriting" (Br. at 115-16). The relevant indictment, 73 Cr. 437, contrary to Deutsch's assertion, not only relates to this offering, but specifically refers to the underwriting of a public offering of the common stock and warrants of

Status Marketing by KAB (see specifically paragraphs 2, 5(b) and (e) of Indictment 73 Cr. 437).*

The second excerpt referred to by Deutsch is Rothman's testimony on cross-examination that when he worked at New Dimension he answered the telephone 25% of the time. Deutsch asserts that this "purely gratuitous remark opened the door to general inquiry by the Government on redirect concerning all the stocks besides Packing . . ." (Br. at 117).

First, this testimony by Rothman which Deutsch cites to at "Tr. P. 3510" is given in response to a question put by the Court on direct examination, *not* by defense counsel on cross-examination. Second, on cross-examination, the *same* testimony was elicited from Rothman in response to the following question by Duboff:

> "Q. How did you arrive at your estimate of twenty to twenty-five percent of the trades in Richard Packing? A. This is approximately how many times I answered the phone" (Tr. 3732).

Rothman's answer can hardly be characterized as "purely gratuitous". Third the following question and answer put to Rothman at the end of his cross-examination by Duboff provided the basis for the Government's inquiry on redirect:

> "Q. To your knowledge, there were no other stockholders of New Dimension Securities? A. No, there wasn't, to my knowledge.
>
> Q. All decisions were made by Mr. Ryback, is that right? A. To my knowledege, yes" (Tr. 3752-53).

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* It is noteworthy that Deutsch's and Duboff's participation in the Status Marketing underwriting, referred to in 73 Cr. 437, and their receipt of 30% of KAB's trading profits in the securities of Status Marketing, or approximately $100,000, was admissible in the instant case as a similar act (Tr. 1567).

On redirect the Government quite properly inquired as to Mr. Ryback's alleged decision-making powers at New Dimension. Rothman simply repeated his earlier testimony and stated that "Mr. Deutsch and Mr. Duboff called in the morning and set the prices for the pink sheets" (Tr. 3755-56). This testimony was obviously relevant to demonstrate that Deutsch and Duboff and not their nominee Ryback, made the decisions with respect to the trading of securities at New Dimension.

Perhaps the most egregious example of Deutsch's tortured reading of the trial transcript in support of his position that the trial judge misapplied the doctrine of "opening the door" is given in connection with the testimony of Bernard Brodkorb, Richard Packing's accountant (Br. at 116). Deutsch states that in questioning Brodkorb, defense counsel did *not* suggest "that the change in accounting rules was a basis for Packing's losses." Deutsch then complains that accordingly the Court improperly permitted the Government to inquire as to other reasons for Richard Packing's losses. An examination of the trial transcript reveals that Brodkorb was extensively cross-examined by defense counsel on the effect of the new accounting rules on reporting Richard Packing's income (Tr. 3911-19). The following exchange between Cohen and Brodkorb makes this clear:

> "Q. Now, you talked, sir, about a loss sustained by Richard Packing Company as of June 30, 1970; isn't that correct? You answered Mr. Feffer's questions about that? A. Yes. It is a loss.
>
> Q. Yes. I just want to direct your attention to the subject. A. Right.
>
> Q. Was not that loss attributable in part to the exclusion from income of franchise fees under that ruling that went into effect in the fall of 1969? A. I would agree, yes, it was" (Tr. 3918-19).

The trial Court then quite properly permitted the Government to inquire further into the composition of Richard Packing's losses.

POINT IV

The instructions to the jury were correct.

Appellants charge that the instructions to the jury were erroneous in various respects. None of these arguments has merit.

At the outset, it is appropriate to point out that much of the trial Court's charge was taken from the charge of Hon. Arnold Bauman in *United States* v. *Soldano*, 73 Cr. 167, *affirmed in open Court sub nom. United States* v. *Sano*, Dkt. No. 73-2761 (2d Cir. April 4, 1974), *cert. denied sub nom. Gardner* v. *United States*, — U.S. —, 43 U.S.L.W. 3239 (October 21, 1974) (Tr. 5020). Moreover, even though appellants' contentions on the charge purport to deal with matters of law, it is particularly noteworthy that except in a very few matters to be discussed, *infra*, no authority whatever is cited in support of their claims. This is especially so as to appellants Cohen and Duboff.

1. Cohen's Contentions (Br. at 62-65)

Cohen first claims that the trial Court committed error by ignoring "the centering of the information on the March 11, 1969, offering circular" and instead noted the Government's contention that Cohen was a party to the conspiracy to manipulate the price of Richard Packing stock and "under Counts 2, 3 *and 4*, the substantive counts, aided and abetted his co-defendants in achieving the same objective" (Tr. 5331). No exception was taken to this charge. First, as discussed in Point II, *infra*, Cohen's attempt to characterize the Information as centering on the Regulation A offering is erroneous. Moreover, the Regulation A offering was clearly an integral part of the scheme to defraud. Second, the Court's statement is certainly an accurate rendition of the Government's con-

tentions; namely, that Cohen's involvement in the preparation of the offering circular which, *inter alia,* managed to submerge the roles of Deutsch and Duboff, and in the preparation of the false and misleading press releases as to the number of franchises sold (the subjects of Counts Two, Three and Four) established Cohen's role in the conspiracy and his involvement in the substantive counts, and thereby materially assisted in the conspiracy to inflate and maintain at artificial levels, through manipulative devices, the price of Richard Packing stock. Moreover, the Court's *Pinkerton* charge (Tr. 5331-5332) followed the principles laid down in *Pinkerton* v. *United States,* 328 U.S. 640 (1946), which have been relied on by this Court in such cases as *United States* v. *Granello,* 365 F.2d 990, 995 (2d Cir. 1966) (Friendly, *J.*), *cert. denied,* 386 U.S. 1019 (1967), and *United States* v. *Alsondo,* 486 F.2d 1339, 1346-47 (2d Cir. 1973) (rehearing petition).

Cohen's claims with respect to the trial Court's description of the parties' contentions are unmeritorious. The Court, in effect, permitted defendants a defense if their statements reflected what they believed at the time and were made in good faith. This favored the defendants perhaps more than they were entitled to, since there is well established and recognized authority in this Circuit to support a conviction where defendants have made false statements under circumstances where they should have known the truth, and shut their eyes to making further inquiry in reckless disregard of the true state of facts. *United States* v. *Sarantos,* 455 F.2d 877, 880-82 (2d Cir. 1972); *United States* v. *Abrams,* 427 F.2d 86, 91 (2d Cir.), *cert. denied,* 400 U.S. 832 (1970); *United States* v. *Simon,* 425 F.2d 796, 805-06, 810 (2d Cir. 1969), *cert. denied,* 397 U.S. 1006 (1970). In sum, the trial Court's charge on these contentions was entirely proper and afforded defendants all that they were entitled to, if not more.

Cohen's argument that there was no evidence to support the Government's contention that Richard Packing was losing money as of April 6, 1970 is totally lacking in merit. Kally testified that Status Marketing, Richard Packing's vehicle for selling franchises, had previously gone bankrupt (Tr. 2748). Moreover, evidence was adduced that for the year ended June 30, 1970, Richard Packing would have lost $51,000 had it not sold its meat packing facilities (Tr. 3867). In addition, the testimony of Cohen's own witness, Dean Faris, and Cohen's Exhibit EE demonstrate that a meeting of the Richard Packing franchisees was called on May 9, 1970, because of the franchises' concern "with the demise of Status Marketing and Status Realty and their general concern for the growth of Circus Wagon" (Tr. 4664).

Cohen's argument as to the Court's supposed impropriety in furnishing the jury with the statutory definition of the term "underwriter" is incorrect and cuts against Duboff's contention that the matter is one of law which should have not been the subject of expert testimony. In any event, the Court was certainly acting within its proper province when it defined a legal concept, "underwriter", in terms of its statutory definition and, in effect, gave the jury a framework within which to appraise for themselves the expert testimony on this subject (Tr. 5316-17). *United States* v. *Fernandez,* 480 F.2d 726, 740 (2d Cir. 1973). Cohen's claim that reading the statutory definition of underwriter had the effect of removing the issue of Shwidock's and KAB's roles from the jury is frivolous.*

The trial Court's rulings on Cohen's factual requests (Br. at 64-65) to charge were within its province and entirely proper, and Cohen's claims to the contrary are

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* The question of Cohen's intent on Count Four and the other counts as well, at all times remained for the jury, since the Court charged on the requirement of wilfulness (Tr. 5315).

frivolous. For example, one of the false statements in Count Four of the Information was that the offering circular failed to disclose that the 10,000 shares were purchased by accounts over which Deutsch and Duboff exercised control or in which they had a beneficial interest. The Harris and Morginstin accounts were the means by which Deutsch and Duboff concealed their ownership and control of 3000 of these shares. Moreover, Cohen had previously arranged to issue valuable stock options in the names of Harris and Morginstin, falsely telling Malmon that they were for valuable services rendered *and to be* rendered to Richard Packing (Tr. 109-110, 113-14, 3381, 3472-73; GX's 6, 68A). Again one of the false statements in Count Four was that the offering circular failed to disclose that Deutsch and Duboff, in return for services to Richard Packing, were receiving compensation, including stock options. Clearly this utilization of Morginstin and Harris by Deutsch and Duboff—which Cohen was well aware of—was highly probative of the crimes charged.

2. Duboff's Contentions (Br. at 164-175)

Like Cohen's contentions with respect to the trial court's charge, Duboff's brief on this score is noteworthy for its noticeable lack of authority to support any of the claims made.

Duboff first contends that the Court's charge left the jury without any guidance whatever as to what misrepresentations they had to examine in order to find appellants guilty. He also argues that the trial court omitted to charge the jury as to the requirement that the alleged misrepresentations had to be material. His contentions are false.

The trial Court set forth the Government's contention that the press release of April 6, 1970 was false and mis-

leading in that the number of franchises had been overstated and that no reference was made to a number of cancellations or that the franchise operation was losing money (Tr. 5285).* Moreover, the Court also set out the specific misstatements in the offering circular which were the subject of the charges in the Information (Tr. 5312-13). The Court further instructed the jury that "there is no charge in this case that the defendants defrauded the Value Line Fund or that the purchase of this stock by the Value Line Fund was in any way a part of the manipulation. This evidence . . . should not be considered by you in determining the guilt or innocence of these defendants" (Tr. 5321). As the Value Line evidence was highly probative as to defendant's schemes and devices in connection with the manipulation charged, this instruction was more favorable to appellants than they were entitled. In any event, it serves to demonstrate the trial Court's efforts to focus the jury's attention on the misrepresentations alleged.**

Equally unmeritorious is the contention that the trial judge failed to instruct as to materiality. The Court de-

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* The trial court then stated that the Government "made other contentions" with respect to the false and misleading nature of these statements. This was in the context of analyzing the parties' contentions as to the matter of franchises and earning's projections (Tr. 5285).

** Moreover, the jury obviously focused on a limited number of material misrepresentations that were clearly set out from beginning to end by the parties and alluded to in the Court's charge. This is made readily apparent by the fact that the jury in its deliberations requested only (i) the press releases, the drafts thereof and similar backup material, (ii) the 1969 Annual Report, which demonstrated the false and misleading nature of the press releases, (iii) Cohen's letter to Bass & Company (GX 84) relative to the distribution of this Annual Report, and (iv) the offering circular (Tr. 5378, 5383). GX 50 and Duboff's Y relative to the trading of Richard Packing stock were also requested (Tr. 5387).

fined "materiality" (Tr. 5307) and made clear that it was an essential element of each and every Count (Tr. 5283-84, 5306-07, 5311, 5315).

Duboff next incorrectly claims that the trial Court failed to instruct the jury that in order to find a defendant guilty they had to find that a false and misleading statement was wilfully and knowingly made (Tr. 5291, 5297, 5306, 5315). Further, contrary to Duboff's position, the Court amply explained "reasonable doubt", and that it was essential for the Government to establish a defendant's guilt beyond a reasonable doubt (Tr. 5271-73, 5287-88, 5305, 5314-15, 5322-23, 5327).* The Court likewise instructed the jury that if they found that defendants believed the statements they made as to the number of franchises sold to be true, and that earnings projections were made in good faith, then the requisite criminal intent in the making of such statements was lacking, even if the figures were wrong (Tr. 5285).

Duboff also raises a series of meritless contentions with respect to the trial Court's charge as to the "manipulation" ** aspect of the case. The Court's charge in this respect, which relied heavily on Judge Bauman's charge in *United*

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* Duboff did not take exception to the Court's charge as to reasonable doubt.

** The charge requested by Duboff on the subject of manipulation, Duboff's Request No. 3, does not constitute anything even approaching an accurate statement of the law. Whether the mutual fund managers were or were not involved in the manipulation was largely if not entirely irrelevant. The Denver Funds' shareholders, *not* the Funds' manager, lost $5.1 million as a result of the manipulation. Duboff, however, kept on attempting to toss this back into the case as a source of confusion. Similarly, a material misrepresentation, as part of a scheme to defraud, clearly suffices to support a guilty verdict, regardless of whether a defendant had a motive or purpose to cause a manipulation or merely to earn dollars. Duboff's claims of error as to the "scheme to defraud" aspect of the case are similarly answered.

States v. *Soldano, supra,* is set forth at pp. 5299-5300, 5308-5309 of the trial transcript and was ample and clearly sufficient. Indeed, the Court charged the jury that the crucial question here is not the manipulative practices themselves, but the agreement to conceal the manipulative marketing practices from the purchasers (Tr. 5308).

In this context Duboff claims insufficiency in the Court's instruction that if the jury found that New Dimension did nothing more than execute orders received from Jaffee & Co. on which a normal profit was made and that the defendants did not conspire to raise or maintain the price of the stock, then the jury could ignore the evidence with respect to their relationship to New Dimension (Tr. 5299).* The defendants were not entitled to any charge at all on this point. New Dimension was a vehicle through which defendants Deutsch and Duboff realized their ill-gotten gains. In effect, the Court was instructing the jury to ignore strong evidence of a principal motive behind the New Dimension transactions involving the sale of much of the five million dollars in Richard Packing shares purchased by the Denver Funds if the jury found that manipulative trading practices were not involved in the case. However, it is and was the Government's position that the evidence of defendants' relationship to New Dimenson was relevant to all of the schemes here charged, including the false and misleading statements about the number of franchises sold, regardless of whether or not the jury found that the defendants had engaged in manipulative practices in the trading of Richard Packing stock,

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* Deutsch similarly raises this same contention (Br. at 108-110). Contrary to their assertions, a comparison between the mark up per share of V.F. Naddeo and Alessandrini on their sales of Richard Packing to Jaffee & Co.--generally ¼ or ½ point—and that realized per share by New Dimension on such sales—generally $2-3—provided the jury with a framework with which to ascertain normal trading profit (Tr. 3201; GX's 83, 86, pp. 11-12).

since the profits realized through New Dimension furnished a motive in any event.

Duboff claims that the charge on Count Four—the false offering circular count—failed to set forth the elements of that Count, failed to charge reasonable doubt and failed to charge wilfulness as one of the elements. These contentions are frivolous (Tr. 5313-5317). Duboff further argues that the trial Court committed reversible error by failing to charge the jury that it should have acquitted Duboff if it found that Duboff, a broker with Jaffee & Co., who functioned as an underwriter with respect to these transactions, had relied upon the advice of Alvin Malmon, counsel for Richard Packing Co., the issuer, in connection with the preparation of the Richard Packing offering circular. Quite apart from the fact that an underwriter cannot assert such a defense, *Escott* v. *BarChris Construction Company,* 283 F. Supp. 643, 697 (S.D.N.Y. 1968), there is not a scintilla of evidence that Duboff ever spoke with Malmon let alone relied on anything Malmon ever said to others.* Moreover, the deliberate effort to conceal the role of Duboff as an underwriter in the Regulation A offering through such artifices as the Morginstin and Harris accounts and the use of KAB, as opposed to their own brokerage house, makes readily apparent the inappropriateness of any supposed reliance by Duboff. In any event the jury necessarily rejected any such claimed reliance on counsel defense on Duboff's behalf when they concluded that Cohen, Richard Packing's President, had not made out such a defense by his own supposed reliance on Malmon, that company's local Minnesota counsel (Tr. 5318-19).

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* It should be noted that it was not until after the conclusion of the charge that Duboff first requested the trial judge to afford him a reliance on counsel charge (Tr. 5351-52, 5363).

3. Deutsch's Contentions (Br. at 101-109)

Deutsch's contention as to the so-called "normal profit" charge has been discussed, *supra* at pp. 84-85.

Deutsch further claims that the trial Court erred in instructing the jury, in pertinent part, as follows:

> "It is not necessary for the government to establish that anyone relied on or suffered damage as a consequence of any false statements or omissions of material facts. It is enough that false statements or statements omitting material facts should be made in the expectation that they would be relied upon" (Tr. 5307-08).

In addition to the three cases cited in Deutsch's brief, *N. Sims Organ & Co.* v. *SEC,* 293 F.2d 78, 80 (2d Cir. 1961); *Hughes* v. *SEC,* 174 F.2d 969, 973-74 (D.C. Cir. 1949) and *United States* v. *Brown,* 79 F.2d 321, 324 (2d Cir. 1935), there is a plethora of additional authority to support the view that reliance is not an element of a criminal securities fraud charge under Section 17(a) of the Securities Act of 1933, Title 15, United States Code, Section 77q(a) and Section 77x (the criminal statute under the 1933 Act). In *United States* v. *Johannes Steel,* 73 Cr. 659, *aff'd sub nom. United States* v. *Ridland,* Dkt. No. 74-1408 (2d Cir. June 21, 1974), Judge Gurfein at page 2223 of the Trial Transcript therein gave precisely the same charge as did the trial court in the instant case. *See,* to the same effect, *Estep* v. *United States,* 223 F.2d 19, 22 (5th Cir. 1955); *Bobbroff* v. *United States,* 202 F.2d 389, 391 (9th Cir. 1953). Moreover, nowhere in Deutsch's brief is to be found even a single case that holds that reliance is an essential element of a criminal charge under Section 17(a) of the Securities Act of 1933. *Hanly* v. *SEC,* 415 F.2d 589, 596 (2d Cir. 1969), cited by Deutsch, actually

supports the Government's position since this Court there held that reliance is *not* an element of a Section 17(a) violation in connection with a remedial sanction.*

POINT V

None of the other claims have merit.

1. Cohen's claim that the court improperly excluded proof of his efforts to locate Surnow is frivolous.

Cohen erroneously argues that the trial Court committed reversible error in refusing to permit him to adduce testimony as to defense counsel's efforts to locate Surnow, a prospective witness.** He relies on *United States* v. *Malizia*, Dkt. No. 74-1389 (2d Cir. September 17, 1974) in support of this supposed proposition of law. *Malizia*, in fact, is wholly distinguishable. In *Malizia*, the Court affirmed a conviction where the Government proved that an informant had not appeared because he was in fear of being killed. That evidence was allowed only after Malizia had rejected an option to exclude such testimony on condition that he

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* In *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 153-154 (1972), the Supreme Court held in a civil case that:

> "positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision".

See also *Mills* v. *Electro Auto-Lite*, 396 U.S. 375, 384 (1970).

** Joseph J. Kally, a Government witness, testified that Cohen had told him that Richard Packing had a 20 million dollar commitment from Jack Surnow from a European source (Tr. 2687). Cohen expressed his intention to call Surnow to prove his good faith in making this statement to Kally, in that Richard Packing never received the money.

refrain from commenting adversely on the Government's failure to produce the witness. *United States* v. *Malizia*, *supra*, at pp. 5466-5468. In this case, however, Cohen, who used Surnow's absence to urge that the Government's proof was insufficient (Cohen Br. at 56), can hardly have been seeking to protect his client against an adverse inference from Surnow's absence.

The District Court, as Cohen recognizes, bent over backwards to compensate for Surnow's unavailability. Thus, Cohen was allowed to show through Alan Dudovitz, a Richard Packing officer, that he had received a letter from Surnow with respect to the supposed commitment. Despite the fact that the letter was never introduced by Cohen, Dudovitz was permitted to testify to its contents. Thus, Cohen was afforded the benefit of Surnow's proposed testimony without Surnow being subjected to cross-examination. Moreover, despite the fact that Cohen had never bothered to subpoena Surnow at any time during the several weeks that it took the Government to put in its direct case following the first time the $20,000,000 came into issue, the trial court, as soon as Cohen revealed his difficulties at the beginning of his direct case, obtained the Government's assistance in an effort to locate Surnow at the eleventh hour (Tr. 4926). And lest any unfavorable inference to Cohen be drawn from Surnow's absence, the Court gave an instruction that no adverse inference was to be drawn against any party by reason of the failure to call a witness (Tr. 5333).

In sum, Cohen's contention as to the District Court's failure to allow him to introduce evidence of his counsel's belated and tardy efforts to locate Surnow is frivolous.

2. The Government's summation was proper

Cohen complains that the Government's summation was improper in a number of respects, but ultimately concedes that the degree of supposed impropriety did not rise to the

level of *United States* v. *White,* 486 F.2d 204 (2d Cir. 1973), *cert. denied,* 415 U.S. 980 (1974), wherein this Court affirmed the conviction (Br. at 57-61). The instant case, as Cohen himself recognizes, clearly stands on an entirely different footing from *White,* and affirmance follows *a fortiori.*

Cohen first claims that there was not a shred of evidence to support the Government's statement, "Of course, he did come back and inherit some money and poured money back into the company . . ." (Tr. 5238; Br. at 57). Dudovitz, Cohen's own witness, testified that Cohen's father died in 1971 (Tr. 4733)* and that Cohen had put money back into Richard Packing beginning in the latter part of 1971 and continuing through June, 1973 (Tr. 4728). Moreover, after Government counsel made his remark in summation, the trial Court, following an objection by Cohen, promptly instructed the jury that it was their recollection of the testimony that would govern (Tr. 5238). Cohen also claims that the Government's statement on the subject of inheritance undermined completely the thrust of his defense. It is difficult to fathom how this can be the case since evidence of Cohen's nearly half million dollars in profit on his sales of Richard Packing stock during the time period of the manipulation—July, 1968 through July, 1970—went to his motive in engaging in the crimes charged. The source of funds he used in 1971 to make capital contributions is irrelevant both to this issue and to any good faith on his part that these capital contributions may be said to have demonstrated.

Cohen next complains about the Government's summation delving into the matter of dune buggies, without apprising the trial Court, as instructed, in advance. Government counsel did little more than juxtapose two statements, one from the Papworth Report, introduced by Deutsch, and one from a press release (GX 31C). Both of these

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* Dudovitz, however, testified that he did not know whether Cohen's father left a "rather sizable estate" (Tr. 4734).

statements had been read to the jury previously (Tr. 859) and no objection was taken by Cohen while these documents were being read from again in summation, although he had ample opportunity to do so. Moreover, Cohen overlooks the fact that he brought the matter up initially in his own summation by criticizing the Government for acting like "Monday morning quarterbacks" in challenging Cohen's business judgment in connection with transfer of funds from the Circus Wagon franchises to Resort Products—the dune buggy operation (Tr. 5164). In any event, it is difficult to see any conceivable prejudice on this score, (i) since Cohen's attorney initiated the discussion of this subject matter during his summation, (ii) since a less inflammatory presentation than reading from two exhibits would be difficult, if not impossible, to contemplate, and (iii) since, in all events, the matter went directly to the issue of Cohen's intent and state of mind.

Cohen further complains about the Government's reading from the various press releases in an effort to demonstrate the falsity of Cohen's statements as to the number of franchises sold (Br. at 59). The Government pointed out that the press releases and other correspondence, when compared to oral representations by Deutsch,* for example, reflected great inconsistencies in the stories that defendants were telling the various financial institutions about the number of franchises sold (Tr. 5186-5188). The Government's summation on this score did little more, once again, than read from exhibits in evidence and, even assuming *arguendo* that there was something improper about this, the Government specifically invited the jury to "take the press releases in, ladies and gentlemen" (Tr. 5188). And what makes Cohen's contention even more ludicrous is that the

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* For example, in July, 1969, Deutsch had told Giasafakis, who had made a field trip to Minnesota for the Denver Funds, that over 200 franchises had been sold (Tr. 2454).

jury accepted the invitation by requesting to see the press releases (Tr. 5378-79).

Cohen also chides the Government for its statement that the Company was losing money and that franchises were being cancelled left and right (Tr. 5192-93). Cohen's contention that the evidence failed to show Richard Packing losing money has been discussed *supra* at p. 80. As to the matter of franchise cancellations, Cohen, himself, elicited the fact that, although Richard Packing had 16 existing or potential franchise agreements, as a result of cancellations, refunds and failures to sign agreements, there were only eight agreements in effect as of June 30, 1970 (Tr. 3910-11; GX 13-B-1).

In conclusion, it is clear beyond any doubt that the Government's summation was proper.*

3. A telephone message memorandum was properly admitted into evidence

The trial judge admitted into evidence Government Exhibit 87C—a three page exhibit consisting of a draft of a Richard Packing press release, an instruction form stating "This Form Must Be Completely Filled Out For Every Release Written," and a telephone message memorandum of a telephone call from Duboff suggesting a change in the press release reflecting a typographical correction in the terms of a tender offer by Richard Packing.

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* Even assuming *arguendo* that any of the allegedly objectionable remarks was ill-advised, it is undisputably clear that, in view of the overwhelming evidence of defendants' guilt, "a reversal would be an immoderate penalty." *United States* v. *Lotsch*, 102 F.2d 35, 37 (2d Cir.), *cert. denied*, 307 U.S. 622 (1939). *See also United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940); *United States* v. *Tortora*, 464 F.2d 1202, 1207 (2d Cir. 1972), *cert. denied sub nom. Santoro* v. *United States*, 409 U.S. 1063 (1972).

Exhibit 87C was admitted into evidence as a business record during the testimony of Ronald Frankel, an officer of Bass & Company, the public relations firm which acted for Richard Packing in connection with its press releases (Tr. 4117). Duboff contends that the trial Court erred in admitting the telephone message memorandum portion of Government Exhibit 87C into evidence, arguing in effect that the Court should have severed and excluded this document from the remainder of the business record, the admissibility of which Duboff does not dispute.

Exhibit 87C, including the telephone memorandum message, was properly admitted on Frankel's testimony (Tr. 4111-12) under the Business Records Statute, Title 28, United States Code, § 1732. Duboff points to Frankel's statement that such telephone records would not usually be "maintained" unless they were an important part of the release record, as was here the case because the telephone message resulted in a material change in the press release with respect to the terms of the tender offer (Tr. 4112). But the point under the statute is not why the record was "maintained" but rather how it was "made". Moreover, it seems clear that even if the record was only "made" when it was important to do so, it would still come within the statute so long as it was the regular course of business to make such a record.

The leading Supreme Court decision of *Palmer* v. *Hoffman,* 318 U.S. 109 (1943), recognized that a document is made in the "regular course of business" when there has been a showing to support the trustworthiness of records because they were routine reflections of the operations of the business. 318 U.S. at 114. In *Palmer,* the Court looked to whether the writing was made as a "matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. . . ." 318 U.S. at 113. The questioned document clearly passes muster under

this test since there was absolutely no motive whatever on the part of Bass & Company personnel to misrepresent the identity of the caller or the text of the message. In all events, the issue of the inherent trustworthiness of a document was a matter committed to the trial court's discretion. *LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965). In sum, the court properly admitted Exhibit 87C, including the telephone message memorandum of which Duboff complains.*

In any case, Duboff's contention that the telephone message memorandum was "the *only* direct connection between Duboff and the press releases . . ." (emphasis added) —and that therefore he was unduly prejudiced by any supposed error—is false. Frankel, of Bass & Company, for example, testified with respect to one of the press releases that Cohen had referred him to Deutsch. When Frankel telephoned Deutsch's office, he was not there and Frankel "got the information, to the best of my recollection from Mr. Duboff" (Tr. 4017).

4. The testimony of the Government's expert witness was properly admitted.

Deutsch (Br. at 110-114) and Duboff (Br. at 161-163) argue that the expert testimony of Mrs. Ruth Appleton, Chief of the Branch of Small Issues of the Securities Exchange Commission, was improperly admitted into evidence because it related both to "ultimate facts and questions of mixed law and fact"; and to "legal conclusions concerning

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* Duboff's contention that the Government should have called the person making the memorandum (Br. at 165) is frivolous, since it is fundamental that it is unnecessary to call the entrant of a business record as a witness. *United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962). Moreover, in the present case the telephone memorandum was not offered to establish the contents of the message, but merely to corroborate Frankel's testimony that he had conferred with Duboff in connection with press releases.

the definition of an underwriter." There is no merit to these claims.

To put this issue in its proper perspective, early in the trial, defendants made Alvin Malmon, Esq., Richard Packing's attorney their own expert witness as to matters involving the Federal Securities Laws. Malmon thus was examined on such matters as the definition of an underwriter (Tr. 227-228), what constitutes a material omission (Tr. 443), and a hypothetical question as to whether a certain person or entity was an underwriter (Tr. 484-85). Indeed, Duboff asked:

> "On the basis of what you have been told and what you know at this date was Kelly, Andrews & Bradley in your opinion an underwriter?" (Tr. 484-85).

Thereafter, the trial Court permitted Mrs. Appleton's expert testimony * along similar lines. Thus, Mrs. Appleton testified as to the general definition of an "underwriter" (Tr. 1640-41), what information must be included in an offering circular (Tr. 1642-43), what is a plan of distribution (Tr. 1644-47), and similar matters (Tr. 1676). Certain hypothetical questions were permitted during Mrs. Appleton's testimony (Tr. 1684, 1687-95).

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* Mrs. Appleton in her duties at the SEC is charged with overseeing "the administration of Regulation A filings that are made with the regional offices throughout the United States . . ." (Tr. 1635). In *United States* v. *Budzanoski*, 331 F. Supp. 1201, 1204-05 (W.D. Pa. 1971), *aff'd*, 462 F.2d 443 (3d Cir. 1972), the Court recognized the appropriateness of expert testimony by one charged with the administration of the Labor-Management Reporting and Disclosure Act.

Duboff's reliance on cases from other Circuits is misplaced. For example, *Myres* v. *United States*, 174 F.2d 329, 336 (8th Cir. 1949), a case involving the Federal income tax laws, *Myres* holds that the matter of hypothetical questions on such subjects "is a field of inquiry which safely may be entrusted to the sound discretion of the trial judge. There is no reason why a jury should be deprived of any assistance that an expert witness can give. . . ."

In connection with this testimony, limiting instructions on expert testimony were given at the time (Tr. 1687-88). Moreover, similar instructions were furnished in the Court's charge to the jury (Tr. 5332-33). Additionally, in its charge, the Court went on to define an "underwriter" in terms of the statutory definition set forth in Section 2(11) of the Securities Act of 1933, Title 15, United States Code, Section 77b(11) (Tr. 5316-18).

Deutsch's contention that Mrs. Appleton's testimony usurped "the jury's role in determining an ultimate issue of fact" (Br. at 110), is refuted by *United States* v. *Fernandez, supra,* 480 F.2d at 740. *See United States* v. *Freeman,* 357 F.2d 606, 623-25 (2d Cir. 1966); *Feguer* v. *United States,* 302 F.2d 214, 242 (8th Cir. 1962) (Blackmun, *J.*).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

GERALD A. FEFFER being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of November, 1974 he served 2 copies of the within Brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelopes and placed the same in the mail drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Gerald A Feffer

Sworn to before me this

29th day of November, 1974

Ralph T. Lee

RALPH T LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975